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**REPORTS**  
OF  
**C A S E S**  
ARGUED AND DETERMINED  
IN THE  
***HIGH COURT OF ADMIRALTY;***  
COMMENCING WITH THE  
**J U D G M E N T S**  
OF  
***THE RIGHT HON. SIR WILLIAM SCOTT***  
(LORD STOWELL),  
Trinity Term 1811.

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By **JOHN DODSON, LL.D. ADVOCATE.**

---

**VOL. II.**  
(1815 — 1822.)

EO magis necessaria est hæc opera quod et nostro sæculo non desunt, et olim non defuerunt, qui hanc juris partem ita contemnerent, quasi nihil ejus præter inane nomen existeret. — *Grotius.*

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**Judge of the High Court of Admiralty — The  
Right Honourable Sir WILLIAM SCOTT (Lord  
STOWELL).**

**King's Advocate — Sir CHRISTOPHER ROBINSON.**

**Advocate of the Admiralty — JAMES HENRY  
ARNOLD, LL.D.**

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# R E P O R T S

OF

## C A S E S

DETERMINED IN THE

### HIGH COURT OF ADMIRALTY,

&c. &c. &c.

SYDNEY COVE, FUDGE,

(Instance Court.)

**T**HIS was a cause of bottomree, promoted by *John Morrison*, the holder of an hypothecation bond, purporting to bind the ship, and the freight due for the transportation of the cargo with which she was *last* laden. The bond was dated at *Rio de Janeiro* on the 15th of *October* 1813, and signed by *Joseph Hemming Fudge*, the late master, for £1,940. 15 s. 4 d.

*April 25th,*  
1815.

Of hypotheca-  
tion bonds, the  
*last* executed  
must be *first*  
paid.

Another action was entered at the same time, on behalf of Messrs. *Wontner* and Co., the holders of two alleged bonds on the ship and on the freight due for the transportation of a *former* cargo, which was delivered and sold at *Rio de Janeiro* in *March* 1813. The first of these two instruments was for £352. 2s. 7d., and was dated at *Sydney* in *New*

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*South Wales* on the 28th of *August* 1811. The second was for £2,582 16s. 0d., and bore date the 21st of *September* in the same year. They purported to have been respectively signed by *Charles M'Laren* a former master.

The assignees of Mr. *Bull*, a *British* subject, who was formerly the sole owner of the ship, but who had since become a bankrupt, consented to the sale of the ship, which was accordingly disposed of under the decree of the court, and the net proceeds of the sale, amounting to £1,019 12s. 2d., were brought into the registry. The assignees of the bankrupt did not dispute the validity of the bond granted to Mr. *Morrison* in *October* 1813; and as the circumstances, under which the other two bonds were executed, are fully set forth in the judgment of the Court, it is unnecessary here to state them.

#### JUDGMENT.

Sir *William Scott*.—The present question arises on the validity of three separate instruments which purport to affect this ship, composing part of a bankrupt's estate. They are asserted to be bonds of hypothecation, and are of different dates. According to the rule of law applicable to instruments of this description, That which is last in point of time must in respect to payment supersede and take precedence of the others. I understand that the assignees of the bankrupt admit the validity of the later bond, and I must presume that they do so after having made due enquiries and upon due consideration of all the circumstances under which it was given.

The

The ship, it appears, became the property of the bankrupt in the following manner. Mr. *Bull* in his affidavit states, “that in the year 1808 *James Underwood* of *Port Jackson* in *New South Wales*, Merchant, being at such time in *London*, was by particular recommendation introduced to the deponent’s house of trade, and did in or about the month of *August* in the said year, purchase of his said house divers goods and merchandize of the value of £17,956, and upwards, and the said *James Underwood* also applied to borrow of the deponent’s said house, in addition to the before-mentioned sum of £17,956 and upwards, the further sum of £793 and upwards, which the deponent’s said house, from the recommendations received, were induced to lend and did lend to the said *James Underwood*; that the said *James Underwood* having soon afterwards purchased the ship *Sydney Cove* proceeded against in this cause, for the purpose of transporting the before-mentioned merchandize to *Port Jackson* in *New South Wales*, and he being unable to pay the balance due to the deponent’s house, which then amounted to the sum of £18,213, but having solemnly promised and engaged that the same should be remitted immediately after the cargo of the said ship was disposed of at *Port Jackson*, the said *James Underwood* did offer to the deponent’s said house as security for part of the debt so due from him, that the name of the deponent should be inserted in the *British Plantation Register* of the said ship *Sydney Cove* as the sole owner of the said ship, but under an express understanding that neither he, the de-

B 2

“ ponent,

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1815.

“ deponent, nor his aforesaid house, should in any  
“ manner interfere with the management of the  
“ said ship or the appointment of her officers, but  
“ that she was to continue in all respects under the  
“ entire directions, instructions, controul, and  
“ employment of the said *James Underwood*, who  
“ was to act in every respect as her sole owner,  
“ and who engaged to furnish at all times every  
“ necessary which the said ship should or might  
“ require; that the deponent’s said house fully  
“ confiding in the honor and integrity of the said  
“ *James Underwood*, and that he would fulfil his  
“ agreement and engagement as to the remitting  
“ the debts due to the said house immediately on  
“ disposing of the said cargo, did consent to accept  
“ such the security offered by the said *James Un-*  
“ *derwood*, and the name of the deponent was  
“ accordingly inserted in the said register of the  
“ said ship *Sydney Cove* as the sole owner thereof;  
“ and he further made oath that the said *James*  
“ *Underwood* having appointed *Charles M’Laren*  
“ and the rest of the officers of the said ship, and  
“ having shipped on board her the several goods  
“ and merchandize which he had as aforesaid pro-  
“ cured from the deponent’s said house of trade,  
“ did, on or about the month of *October* in the said  
“ year 1808, proceed in the said ship, which was  
“ amply fitted, provisioned, and stored from the  
“ said port of *London* to *Port Jackson* aforesaid,  
“ where, as the deponent verily believes, he arrived  
“ with the said ship and goods, and where the said  
“ *James Underwood* sold such the goods procured  
“ from the deponent’s said house as aforesaid on  
“ his own account; and the deponent further  
“ made

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“ made oath that the said *James Underwood* did  
 “ not fulfil his promise and agreement with this  
 “ deponent’s said house of trade by immediately  
 “ remitting the aforesaid debt due by him to them ;  
 “ that the said *James Underwood* only remitted to  
 “ them, on account of his aforesaid debt, the sum  
 “ of £6,020 9s. 1d., £1,292 3s. 5d. of which  
 “ remittance was dishonoured and still remains  
 “ unpaid, nor hath the said *James Underwood*,  
 “ nor any other person or persons on his account,  
 “ at any time since, made any further or other  
 “ remittance or payment on account of the said  
 “ debt, but that the sum of £15,579 16s. 2d.  
 “ still remains justly due and owing to the estate  
 “ of this deponent and his late partner, on account  
 “ of the before-mentioned debt ; and the deponent  
 “ further made oath, that he does not believe that  
 “ any sum or sums of money whatever were  
 “ advanced by *Joseph Underwood* of *Port Jackson*  
 “ aforesaid on account of the said ship, on bot-  
 “ tomree or otherwise : that the said *Joseph Under-*  
 “ *wood* is the brother of the before-mentioned *James*  
 “ *Underwood*, and was and is, as this deponent  
 “ verily believes, in distressed circumstances, and  
 “ in the service and under the controul of the  
 “ aforesaid *James Underwood* ; and he lastly made  
 “ oath that he does verily and in his conscience  
 “ believe, that if any bond or bonds of bottomree,  
 “ or otherwise were given by the said *Charles*  
 “ *M’Laren* (who was as aforesaid appointed by  
 “ the said *James Underwood* to be the master of  
 “ the said ship) to the before-mentioned *Joseph*  
 “ *Underwood*, the same were so given without  
 “ any monies being advanced for the same, and

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“ were so given under the order, direction, and  
“ control of the said *James Underwood*, for the  
“ sole purpose of defrauding the deponent’s  
“ aforesaid house of trade, of the only security it  
“ has for the payment of the aforesaid debt of  
“ £15,579 16s. 2d.” This is the history of the  
transaction as given by Mr. *Bull*, and a demand for  
a large sum of money is now set up, not by this  
man *James Underwood* himself, but by his brother  
*Joseph Underwood*, under these asserted bottomree  
bonds.

The due execution of a bond in a foreign port cannot be proved by a mere formal affidavit of persons resident in this country, swearing to facts of which they have no personal knowledge, nor any information or document on which to found their belief.

The first observation that strikes one is that no proof is produced of the due execution of these instruments: nothing is offered in the way of evidence but a formal affidavit from persons resident in this town, who without referring to any information they may have received, or to any document in support of what they advance, swear positively to facts of which they can themselves have no personal knowledge. What Mr. *Thomas Wontner* the younger swears is this, that he and his father *Thomas Wontner* the elder, “ are the lawful  
“ attornies of the said *Joseph Underwood*, and  
“ have by themselves or agents repeatedly applied  
“ to the said *Charles M'Laren*, or other person  
“ succeeding him in the command of the ship,  
“ for payment of the money secured by the afore-  
“ said bonds of bottomree, but have not been able  
“ to obtain payment of the same.” Now it is  
here to be observed, that this gentleman does  
not state whether the validity of the bonds was  
admitted or denied by the persons to whom he  
applied, or, indeed, whether he received any  
answer whatever to the applications which he  
made:



made: he goes on to state, that “*they* (thus pluralizing the affidavit) “verily believe that the “principal sums and interest so as aforesaid lent “and advanced by the said *Joseph Underwood* to “the said *Charles M'Laren* still remain due and “unpaid; and that there are no other means “of obtaining payment thereof, than by proceedings in this court.” I cannot consider an affidavit of this kind as any thing more than a mere formality: and although I do not go the length of asserting that it has been made with any evil intention by Mr. *Wontner*, yet I must say that it contains nothing to substantiate the facts averred in it: no proof of the hand-writing of the person by whom the bond purports to have been executed, or indeed of any other fact establishing the execution. It is dry gratuitous assertion and nothing else; and now at this late period, permission is asked to give proof of a bond asserted to have been executed so long ago as the year 1811. This is what I cannot grant, and I must say that I think the objection to the bonds on the ground of want of proof of the due execution, is fatal and peremptory.

Let us now look to the substance of the transaction as it regards these two bonds. The first bond, which is for the smaller sum, is not in the nature of a bottomree transaction, for the money appears to have been advanced upon *personal security*, and it is quite clear, that bonds of hypothecation can only be given where personal security is wanting. The bond itself begins with the following recital; “Whereas one *James Mitchell*, on the 25th day of *July* last exhibited “his petition by one *Michael Hayes*, his agent, to

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Hypothecation  
bonds can be  
given only where  
money is not to  
be had on personal  
security.

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“ the court of civil jurisdiction, stating (among  
 “ other things) that on the 30th of *April* last, he  
 “ brought his action against *Charles M'Laren*,  
 “ master of the ship *Sydney Cove* then in this  
 “ port for the sum of £358 15s. 3d. sterling  
 “ for necessaries supplied the said ship by the  
 “ said *James Mitchell* against the said *Charles*  
 “ *M'Laren* for the sum of £352 0s. 3d. and  
 “ costs; from which judgment the said *Charles*  
 “ *M'Laren* appealed to his excellency the  
 “ governor, who was pleased to affirm the decree  
 “ of the said court.” Here then is a *personal*  
*proceeding* not at all founded upon a bond of  
 hypothecation. The bond goes on to recite “ that  
 “ the said *Charles M'Laren*, on the 1st day of  
 “ *June* last, drew a set of bills in favor of one  
 “ *Joseph Underwood* for the sum of £352 2s. 7d.  
 “ sterling, upon one *John Bull* of *London*, Merchant,  
 “ and indorsed by the said *Joseph Underwood*, and  
 “ approved by *James Underwood*, agent for the  
 “ said *John Bull*.” Why, if *Bull's* affidavit is to be  
 believed, this is extraordinary indeed, for according  
 to his statement “ the vessel was to continue in all  
 “ respects under the entire directions, instructions,  
 “ control, and management of *James Underwood*,  
 “ who was to act in every respect as her sole  
 “ owner, and who engaged to furnish at all times  
 “ every necessary that the ship might require.”  
 The instrument goes on to recite that “ the above  
 “ set of bills was accepted by the said petitioner in  
 “ discharge of the said judgment.” So that the  
 party had brought his action and obtained the  
 proper remedy for the grievance of which he com-  
 plained. It is further recited in the bond, that since  
 that

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that set of bills was given, intelligence had been received that the house of *Bull and Banks*, of which the said *John Bull* is a partner, had been declared bankrupts, and that from that circumstance the bills were no longer negociable. This was certainly an unfortunate piece of intelligence for the parties, but it cannot alter the nature of the security, or make a valid hypothecation of that which had its origin in a transaction entirely different. It is likewise stated, that all the parties concerned appeared in Court, and that, with the consent of them all, the Court decreed (amongst other things) "that the said *Charles M'Laren* pledge the said ship "*Sydney Cove* to the said *Joseph Underwood* by a "bottomry bond," &c. The Court did not, I presume, enquire very minutely into the circumstances of a case in which all parties were agreed, and it certainly had no authority to convert into a valid bond of hypothecation an instrument which was illegal as such.

With respect to the second bond, which was for a larger sum, *That* is said to have been for money lent to enable the vessel to prosecute her voyage in the Southern Whale Fishery at the rate or premium of 25 per cent. for the voyage. These are words of proper and necessary limitation; but I was somewhat surprised to find that the money was not to be paid until after the safe arrival of the ship at her moorings *in the River Thames*: the ship *might not have come*, and, in point of fact, *did not come* to this country for several years. It seems not a little extraordinary that a man should thus advance money without any limitation as to the time when it was to be repaid, or if limited at all, to a term which never might arrive.

Upon

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1815.

Upon the whole of this case, I think there is no proof of the due execution of these two bonds, nor any admission to that effect; and I am not disposed at this late hour to permit the parties to adduce proof of the execution of bonds bearing date at so remote a period of time as the year 1811, and still less do I think myself at liberty to pronounce for their validity upon the evidence as it now stands: I shall, therefore, pronounce for that bond which was given to Mr. *Marrison* at *Rio de Janeiro* in *October* 1813, the validity of which is not contested by the assignees of the bankrupt.

## SYDNEY COVE, FUDGE.

(Instance Court.)

**THIS** was a question arising out of the same property as the last case. It was a cause of subtraction of wages promoted by *Thomas Elsworth*, the administrator of the goods of *James Innes* deceased, who was, whilst living, the chief mate of this vessel, against the proceeds arising from the sale of the ship still remaining in the registry.

May 6th, 1815.

The court of admiralty has no jurisdiction over cases of seaman's wages when founded on special and extraordinary contracts.

A summary petition had been given in on the part of Mr. *Elsworth* nearly in the usual form; It alleged that, in *August* 1808, *James Innes* was hired to serve as chief mate on board the ship on a voyage to *New South Wales*, and afterwards on a whaling and sealing voyage, and back to the port of *London*, and that he was to have wages during the outward voyage at the rate of £8 per month; that the vessel arrived at *New South Wales* on the 26th of *April* 1809, and completed the delivery of her cargo on the 17th of *July* in that year: It further set forth, that the ship again sailed on the following day, and that *Innes* served in her until some time in the month of *May* 1813, when he died on board the vessel at the *Brazils*, without having received any thing on account of his wages. This petition was admitted without opposition.

An additional article was now offered, setting forth the particulars of the whaling and sealing voyage in which the ship had been engaged before her

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May 6th, 1815.

her arrival at the *Brazils*; and alleging that the cargo sold for the net sum of £6,442 10s. 1d. and that the said *James Innes* shipped and hired himself as chief mate on such whaling and sealing voyage at and after the rate of a twenty-fourth part or share of the net produce of the oil and skins produced thereon.

The admission of this article was opposed on the ground that the Court of Admiralty had no authority to entertain the cause, and that it could not adjudicate upon a question which was in the nature of a partnership transaction. In support of the doctrine, that the Court had no jurisdiction over extraordinary contracts of this kind, *Lushington*, of counsel for the bondholder, cited the cases of *Opy v. Addison*, *Salk.* 31. *Campion v. Nicholas*, *Strange*, 405. *Cossardt v. Lawdley*, 3 *Mod.* 244. *The Mariner's Case*, 8 *Mod.* 379. *Howe v. Napier*, 4 *Burr.* 1944. *Buggen v. Bennet*, *ibid.* 2035. *Day v. Searle*, 2 *Strange*, 968. 2 *Barn.* 419.

The Court asked, whether any case could be found in which such a question had been disposed of by the Court of Admiralty and intimated its opinion, that it did not possess the jurisdiction. The case was directed to stand over, that search might be made for precedents, but none being found, the article was on a subsequent day (11th *May*) rejected.

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The case again came before the Court on the 21st *November* 1815, upon the evidence adduced in support of the summary petition, when  
*Lushington*

*Lushington* for the holder of the bond which had been pronounced for, contended,

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1st, That a mariner, whose wages accrued before the execution of a bond, was not entitled to priority of payment over the bond holder.

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2d, That the present was not a proceeding for ordinary wages, over which the Court of Admiralty had jurisdiction, but for a share in the profits of a whaling voyage, which was not recoverable in a court of this description.

The Court said, that the claim of a mariner for wages stood on very different grounds from those of a bondholder, and that the hypothecation of the ship could not divest his interests, nor even a sale of it, except it was made under the authority of a competent court. That a seaman's claim for his wages was sacred as long as a single plank of the ship remained.

The hypotheca-  
tion of a ship  
cannot deprive  
the seaman of  
his right to  
wages.

Upon the second point, the Court observed, that in this particular case, there was a considerable degree of obscurity arising from the manner in which the mariners contract was drawn up; but that it thought the fair construction was, that the mariners were at all events to be entitled to monthly wages during the outward voyage, and that the whaling and sealing voyage was eventual only, being altogether dependant on the inclination of Mr. *Underwood*. The Court therefore pronounced for the claim of wages, with costs.

## GOVERNOR RAFFLES, KING.

(Instance Court.)

*May 2d, 1815.*  
Salvage is not  
due to the crew  
of a ship for  
rescuing it from  
mutineers.

THIS was a cause of salvage brought by *Andreas Dahl* the carpenter, and others of the crew, for having rescued the ship and cargo from some *Malay* mutineers, who had risen upon the master and taken possession of the property. The ship sailed from *Batavia* on the 30th of *September* 1813, on a voyage to the port of *London*, with a crew consisting of five *Europeans*, twenty-two native *Portuguese* indians and lascars, and had also on board nineteen *Malays*. About two o'clock in the morning of the 9th of *November* the *Malays* rose upon the rest of the crew, and having killed the gunner and the man at the helm (a *Portuguese* indian) and one other *Portuguese* and four lascars, and severely wounded the mate and also the Serang and several others of the crew, they succeeded in driving the rest below, and kept possession of the ship until about eleven o'clock on the following morning, when by the exertions of *Andreas Dahl* and others of the crew she was rescued from their power. At that time *Dahl* and those by whom he was assisted broke open the companion door, and getting upon the deck, attacked the *Malays*, knocked three of them overboard, and driving the rest below, fastened down the hatches upon them. Having thus far succeeded in recovering the ship and cargo from the power of the mutineers, they continued under arms until the next day, when they in



in vain summoned the *Malays* to surrender, and not perceiving any other means of preserving the possession of the ship, they then took up two of the planks of the deck, fired down upon the *Malays*, and having killed two and put four of them in irons, they set the remainder adrift in the jolly boat, and afterwards safely brought the ship and cargo to *London*, the port of her destination. The four mutineers who were brought to this country in irons were afterwards tried at the *Old Bailey* for murder, and were condemned and executed for the offence.

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On the motion of counsel a monition was decreed against the owners of the ship or their agent, and also against the consignees of the cargo, to shew cause why salvage should not be awarded for the rescue of the ship and cargo.

An appearance was given for the agents of the owners of the ship and the consignees of the cargo, under protest to the jurisdiction, and an Act on petition, was entered into by the proctors for both parties, supported by affidavits in the usual manner.

For the parties appearing under protest *Jenner* and *Phillimore* contended, that the crew were bound to exert themselves to the utmost of their power for the preservation of the ship and cargo, and that the mere performance of their duty could give them no title to be rewarded as salvors. That the case differed materially from that of a recapture from the enemy, because the act of capture by an enemy discharged the crew from the obligation which was otherwise imposed on them. That it was no part of the duty of a crew to recover a ship from an enemy

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enemy by whom she had been captured, but that they were bound at all times and under all circumstances to resist and subdue a mutiny. That the mode of proceeding was altogether erroneous, inasmuch as it ought to have been directed against the *ship* and *the cargo*, or against *the owners* themselves, and not against *the agents* of the ship and *consignees* of the cargo, who had not sufficient of the proceeds remaining in their hands to repay the advances they had already made. That the vessel was gone back to *Batavia* where the owners reside, and from them compensation should be sought if any were due.

*Swabey* and *Lushington* on behalf of the crew contended, that there was the same right to enforce the process of the Court against *the agents* and *consignees* as against the *owners* themselves. That the owners in this case were resident in *Batavia*, where the arm of the Court could not reach them. That the consignees could not, under the circumstances, have any just ground of complaint, because they had sent away the ship since the monition went out against them. That the danger of rescuing this ship from the insurgent *Malays* was as great and the act as meritorious as that of recapturing a vessel from the enemy. That the service rendered in rescuing the vessel from the mutineers could not have been contemplated when the men entered into the agreement for their wages, and therefore they ought to have some reward beyond that which they had stipulated for in the contract with the owners. That there was no particular definition of a salvage service to be found in the books, and that the Court of Admiralty had jurisdiction

diction to reward any services performed upon the high seas. *Hope*, 3 Robinson, 215. *Trelawney*, *ibid.* (in notes) 216. 4 Robinson, 223.

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### JUDGMENT.

Sir *William Scott*.—When a motion was made for a warrant to arrest this ship and cargo, the Court declined to grant it, and recommended in preference the mode which has been adopted of calling by monition upon the agents and consignees. I entertained considerable doubt whether the service, which has been performed was of such a kind as this Court had the power of remunerating, and thinking it so very doubtful whether any salvage was due, I was unwilling to put the parties to the inconvenience of having their ship arrested.

The case now comes before me by protest against the jurisdiction of the Court, and I must confess that I am not aware of any case in which the Court has taken upon itself to assign a reward for services precisely of this description. It has been said that no exact definition of salvage is given in any of the books, I do not know that it has, and I should be sorry to limit it by any definition now. But it appears to me that it is the bounden duty of the crew to give every assistance in their power to prevent or quell a mutiny, and to use their utmost exertions to preserve or recover the possession of the vessel and goods of their employers. The case is extremely different from that of rescue from an enemy, because *there*, the moment the capture is effected, the crew are discharged from their duty to their employers.

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The contract between the parties is at an end. The seamen no longer constitute the crew of the vessel, but become prisoners of war. Not so in the case of mutiny, for *That* does not discharge them from their duty to their owners, whose property they are bound, if possible, to recover. I do not mean to say, that they are called upon to sacrifice their lives wantonly and to no purpose, but I think they are bound to use their best endeavours whenever there is a reasonable prospect of success. A service of this kind does not appear to go beyond the limits of that duty which they are bound to perform in virtue of the engagement which they have contracted with their owners. This is the inclination of my opinion at present, and unless cases of a similar kind can be adduced, in which the Court has interfered, I should be unwilling to make a precedent, and to extend the doctrine of salvage, beyond the limits in which it has hitherto remained, by introducing a new species. The case which has been cited is very different from the present, for *there* the reward was decreed to the crew of another ship, upon whom no duty was imposed, calling upon them to attempt the rescue. I shall not dismiss this case at present, but suffer it to stand over, to see if any precedents can be produced. If none such can be found, I think I shall dismiss this suit.

N. B. No precedents were discovered, and the suit was accordingly dismissed.

## GALEN, ROGERS.

THIS was an *American* ship laden with a cargo of cordage, iron, canvas, and tar, and proceeding on her voyage from *Cronstadt* to *Rio Janeiro*, under the convoy of His Majesty's ship *Courageux*, Captain *Wilkinson*, Commander, and five other of His Majesty's ships of war, such convoy consisting of about 300 sail of merchant vessels, among which were also seven other *American* ships. At  $\frac{1}{2}$  past 8 o'clock in the evening of the 11th of *August* 1812, whilst the fleet was proceeding into the *Great Belt*, it was joined by His Majesty's ship *Pyramus*, under the command of Captain *Charles Dashwood*, who communicated to Captain *Wilkinson* the order for the detention of *American* property. The execution of this order it was thought advisable to postpone until the following morning, lest the boats which might be sent to take possession should be fired upon in the dark by the ships of the convoy, or the *American* vessels take the opportunity of escaping. At daylight on the following morning the fleet got under weigh, and between 11 and 12 o'clock the weather having become calm, was brought to anchor off the island of *Femerin* in the *Great Belt*, and the *Galen* and other *American* ships were seized and detained by the boats of the *Courageux* and the other ships of the squadron. At this time another fleet of His Majesty's ships, consisting of the *Cressy* and four others, were going into the *Baltic*; the claim of these ships to share in the proceeds arising from these seizures was not disputed; but a similar

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Sight alone is generally sufficient to entitle king's ships to share as joint-captors, but there are exceptions to this rule.

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claim having been made on behalf of His Majesty's ship *Aquilon*, Captain *William Bowles*, and His Majesty's bomb vessels *Devastation* and *Meteor*, the question to be determined was, whether they were entitled to share in the proportion intended to be given to the captors by the crown, to whom the property had been condemned as having been taken previous to the declaration of hostilities against *America*.

The King's Proctor consented on behalf of His Majesty that the several parties praying to be rewarded as joint captors might be allowed to support their respective claims by judicial proceedings in the Court of Admiralty.

The circumstances on which the commanders of the *Aquilon*, *Leviathan*, and *Meteor* rested their claims to be considered as joint captors are detailed in the judgment of the Court.

Previous to the commencement of the argument on the main question, the King's Advocate objected to the evidence of Mr. *William Luckcraft*, first lieutenant of the *Meteor*, and a releasing witness, because in an answer to an interrogatory addressed to him on his cross-examination, he stated, that " he will not swear that he is a disinterested witness in the cause, or that he will in no way be a gainer or loser in any event thereof, because he supposes and believes that his share will in some way be made up to him if the *Meteor* should be pronounced to be a joint captor."

Dr. *Adams*, on the other side, argued for the competency of the witness, as he stated in answer to another part of the same interrogatory, that “ in consequence of his having executed the release he considered he had no *right* to share in the prize in question, and that he was therefore a disinterested witness in the cause.”

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The Court thought the objection went to the *credit* rather than to the *competency* of the witness, and directed his evidence to be received.

#### JUDGMENT.

Sir *William Scott*.—This case comes before the Court on a reference from His Majesty’s government, requiring It to decide on the conflicting claims of persons asserting themselves to be entitled to share in the proportion of the proceeds of this ship and cargo, which has been given up by the crown for the benefit of the seizors. The memorials which have been delivered in by the parties conceiving themselves to be entitled under this grant from the Crown, contain statements of facts which are not very reconcileable with each other, and which therefore render it somewhat difficult to decide upon their respective claims. It is a very disadvantageous circumstance also, that none but releasing witnesses have been examined. It is an established rule, and one which I have never known to be relaxed, that no claim of joint capture can be substantiated on the evidence of releasing witnesses only ; I think it but reasonable, however, not to apply the strictness of this rule to the present case, because the reference to the Court for its de-

Where it is impossible to obtain witnesses from the captured vessel, a claim of joint-capture may be sustained on the evidence of releasing witnesses only.

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cision was not made until after the *Americans* who were captured on board the prize had quitted this country. Under these circumstances it was impossible to obtain the testimony of witnesses coming from the captured vessel: and although the absence of such testimony is a circumstance which renders it by no means convenient or easy to come to a just decision on the merits of the case, yet as it has been referred to me by His Majesty's government, at the request of the parties, I am bound to deal with it in the best way that I can.

The claim is grounded on the *fact of sight* and the *intention to capture*. What is stated on the part of the *Aquilon* and *Devastation* is this, that on  
 “ the morning of the 12th of *August*, the ships  
 “ in company with the *Meteor* bomb vessel were  
 “ proceeding through the *Great Belt* into the  
 “ *Baltic*, and that the commanders of them were  
 “ respectively acquainted with the orders issued  
 “ for the detention of all *American* vessels and  
 “ their cargoes; that at half-past seven in the morn-  
 “ ing they came to an anchor off the island of  
 “ *Femerin*, and at about 8 o'clock observed several  
 “ ships in the south-east quarter steering to the  
 “ westward towards them, and at about half-past  
 “ nine clearly ascertained them to be a large con-  
 “ voy under several ships of war, which about 11 or  
 “ 12 o'clock came to an anchor between the island  
 “ of *Femerin* and the *Trendelin Reef*, the weather  
 “ having become calm; that it was at such time  
 “ known on board the *Aquilon* and *Devastation*,  
 “ as well as on board the *Meteor*, that there were  
 “ *American* vessels in the convoy, and the com-  
 “ manders of the said ships intended to examine  
 “ and



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“ and detain all such *American* vessels as were “ not furnished with *British* licences.” One of these ships, was directed by Sir *James Saumarez*, whom they had fallen in with at *Gottenburgh*, to convey intelligence of the proclamation of the government for the detention of *American* ships to Captain *Wilkinson* the commander of the *Baltic* fleet, but that officer, it appears, had received from another quarter previous information of the hostilities which had taken place. It was notorious that there were at this time very many *American* vessels employed in the trade of the *Baltic*, and that there was hardly a convoy which had not some of them under its protection, but the matter did not, in the present instance, rest on the mere notoriety of the fact, for it appears that the officers commanding these vessels had received positive information from Sir *James Saumarez* that there was a large convoy coming from the eastward with *American* ships in it. The parties sailed under the expectation of benefiting by the capture of *American* vessels ; they kept a good look out for the purpose of communicating the news, and of assisting in the captures that were likely to be made, and thought they should have “ a good “ share,” as they term it, “ of the prizes.” It turns out, however, that the news had been communicated to the commander of the convoy before they came up, although he deemed it not expedient to make any seizure on the night he received the intelligence, but postponed the business until the following day, fearing that the boats might be fired into in the dark, or that the *American* vessels might make their escape into some of the adjacent ports.

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The material fact in dispute is, whether these ships, sailing to the east, were in sight of the convoy going to the west, at the time when the capture took place. The seizure was consummated by sending the boats of the convoying ships to take possession, which must probably have been effected without producing any thing that would attract particular notice or attention from other ships at a distance. There is nothing, therefore, in the mode of making the capture which at all assists the case of the parties setting up the claim of joint capture. They insist, however, that they were in sight at the time of capture, that they had a knowledge of there being *American* vessels in the convoy, and that they had the *animus capiendi*. The general rule certainly is, that sight alone is sufficient to entitle king's ships to be considered as joint captors, and it is a rule that is liable to very few exceptions. If indeed the ships should be sailing in different directions and at a great distance from each other, that would form an exception, and the rule be no longer in force. Again, if a ship is lying in port unarmed and unrigged, if it is physically impotent, and can afford neither *encouragement to the friend nor intimidation to the enemy*, then its claim to be considered a joint captor cannot be supported, even though it should be distinctly proved to have been in sight at the time of capture. The general presumption undoubtedly is, that the *animus capiendi* exists, for it must always be supposed that the king's officers are willing to do their duty. If the *animus capiendi* existed in this case, and the ships were endeavouring to come up, but could not, on account of the state of the wind,

wind, that is a case which does not come within the exceptions. If they had a knowledge of what was going on, and used their endeavours to come up, that is sufficient.

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The allegation of the asserted joint captors, at the time when it was first offered appeared to be defective, because it did not contain any averment that the parties had a knowledge that there were any *American* ships in the convoy, much less that they had an intention to capture them; and being stripped of these essential circumstances the case was reduced to this, that a capture was made of which they were entirely ignorant, and in which they had no intention to participate. Under such a defective statement it was quite impossible that the claim could have been maintained; and therefore, in conformity to the opinion then signified by the Court, the allegation was altered and amended. The question then is, What sort of knowledge is requisite to be shewn? Now I certainly never thought of requiring that they should be acquainted with the names and descriptions of the particular *American* vessels which were in the convoy; nor, on the other hand, should I be satisfied with their having a mere general knowledge that there must be some *American* ships upon the ocean.—It is sufficient that they had such a probable knowledge that there were *American* ships in the convoy as would induce them to act. That they *had* such a probable knowledge is pretty clearly established by the evidence in the cause, and as to the *animus capiendi*, that follows by necessary implication of law. They must have had the *intention* of capturing, and therefore if sight is proved, then I think they will be entitled

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entitled to share as joint captors, otherwise not.

The question therefore of sight at the time of capture becomes the main question in the cause.

The allegation of the actual captors was not opposed at the time of its admission, if it had been, my attention would have been called to it, and I should have suggested an alteration by directing them to state at what precise time the *Aquilon* and the two brigs came in sight, for in truth the whole question turns upon this, were they in sight at the time of capture or were they not. Upon this point, or indeed upon any other, only one witness has been examined on the part of the actual captor, and he is a gentleman who is wholly incapable of furnishing the Court with any precise information on the subject, for he was himself below at the time, and he states that "he did not" (as indeed from his situation he could not) "take any particular notice of what passed in regard to any strange vessels having appeared in sight." On the other side three witnesses have been examined, who may, I think, very fairly be reduced to two, for one of them (*Bowyer*) is liable to the same objection as the witness examined for the actual captors, namely, that he was below at the time, and consequently can only speak from the report made by other persons. The other two witnesses pursue the history of the transaction throughout pretty much in the manner I have described it, stating their knowledge that war had broken out between *Great Britain* and *America*, their intention to capture *American* vessels, and that they kept a good look out for the purpose of discovering them. What Lieutenant *Sparrholt* of the *Aquilon* states is this,

this, “ that on the morning of a day happening in  
“ the month of *August* in the year 1812, which  
“ he believes was the 12th day of the said month,  
“ the *Aquilon*, and the said two bomb vessels  
“ *Meteor* and *Devastation*, were proceeding toge-  
“ ther through the *Great Belt* into the *Baltic Sea*,  
“ and at about half-past seven o’clock that morning  
“ they came to an anchor off the island of *Fe-*  
“ *merin*, and that about eight o’clock the said  
“ morning, the deponent being then upon deck,  
“ heard it reported, from the man on the look-  
“ out at the mast head of the *Aquilon*, that several  
“ ships were in sight at the south-east quarter, but  
“ the deponent did not go aloft to look at them,  
“ for it was pretty well known, or supposed, both by  
“ captain *Bowles* and himself, that such ships were  
“ a fleet of merchant vessels coming down the  
“ *Baltic* from *Hano* ; as admiral Sir *James Sauma-*  
“ *rez* had informed the said captain *Bowles*, that a  
“ large fleet of merchant vessels, in which it was  
“ known there were several *Americans*, was coming  
“ down the *Baltic* under convoy of His Majesty’s  
“ ship *Courageux*, captain *Wilkinson* commander,  
“ and of several other ships of war, and had  
“ desired the said captain *Bowles* to inform cap-  
“ tain *Wilkinson* of the aforesaid orders of His  
“ Royal Highness the Prince Regent, to detain all  
“ *American* vessels and their cargoes, as soon as he  
“ could come up with the said convoy ; and in the  
“ course of the time that captain *Bowles* and the  
“ deponent were at breakfast together, at about  
“ half past eight o’clock that morning, they con-  
“ versed together on the subject of the said ships  
“ reported to be in sight, being the said expected  
“ convoy,

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“ convoy, and sent a man with a glass up aloft,  
“ to see in what direction such ships were steering,  
“ when he reported that they were steering to the  
“ westward down the *Belt*, which was in a direction  
“ towards the *Aquilon* and the said two bomb  
“ vessels; and *when the deponent went on deck*  
“ *again, about nine or a little after nine o'clock the*  
“ *said morning, he saw them, and clearly made out*  
“ *the ships to be a large convoy under the protection*  
“ *of several ships of war, by the help of a glass, and*  
“ *could also see them even without a glass, from the*  
“ *deck of the Aquilon*; and it being then pretty  
“ certain that such fleet was the convoy that the  
“ said Sir *James Saumarez* had as aforesaid men-  
“ tioned to captain *Bowles*, he the said captain  
“ *Bowles* determined to detain and take possession  
“ of as many of the *American* vessels and their  
“ cargoes in the said fleet as he could.” The  
evidence given by Mr. *William Luckcraft*, of the  
*Meteor*, is very much to the same effect. He says,  
that “on the morning of the 12th of the said  
“ month of *August*, just about seven o'clock, to  
“ the best of his recollection as to the hour, the  
“ said three ships being then preparing and just  
“ about to come to an anchor off the island of  
“ *Femerin*, in the *Great Belt*, on account of the wind  
“ and tide not permitting them to proceed further  
“ towards the *Baltic Sea*, he the deponent, being  
“ then upon deck of the *Meteor*, heard the man  
“ upon the look-out at the mast head of that vessel  
“ report a convoy in sight to the south-east quarter,  
“ steering to the westward, towards the said three  
“ vessels, the *Aquilon*, *Meteor*, and *Devastation*,  
“ which were very near to each other, which said  
“ convoy.

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“ convoy was then well known to be the expected  
“ fleet of merchant vessels coming down the  
“ *Baltic* to *Gottenburgh*, under convoy of several  
“ of His Majesty’s ships of war ; but the weather  
“ being then rather hazy, and the said fleet being  
“ at the distance of seven or eight miles, as he  
“ supposes and believes, he did not then see any  
“ of the ships composing the same, nor was much  
“ notice taken of them, until they came near  
“ enough to be seen from the deck of the *Meteor*,  
“ for the wind and tide being then in favor of  
“ the said fleet, coming down to the place where  
“ the *Aquilon*, *Meteor*, and *Devastation* were, as  
“ aforesaid, preparing to come to an anchor, and  
“ did accordingly come to an anchor a little  
“ after seven o’clock that morning, and where the  
“ said three ships continued lying at anchor until  
“ the evening of the same day, the said place  
“ being off the island of *Femerin*, it was fully ex-  
“ pected that the said fleet would have continued  
“ under weigh, until it had also come down to  
“ the said three ships, and so well was it known  
“ on board the *Meteor*, that the said fleet of ships  
“ which had been reported in sight, was the ex-  
“ pected convoy of merchant ships coming from  
“ *Hano* to *Gottenburgh*, that the falling in there-  
“ with caused much joy among the officers of the  
“ *Meteor*, for it was expected by them that they  
“ would get a good share of prize money, by the  
“ capture of the *American* vessels, which it was  
“ well known were in the said fleet, and such  
“ expected capture of *American* vessels became the  
“ subject of conversation between captain *Fisher* of  
“ the *Meteor* and this deponent, by which he knows  
“ that

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“ that the said captain *Fisher*, under a supposition  
“ that the orders for detaining *American* vessels  
“ could not have been communicated to the com-  
“ manders of His Majesty’s ships of war convoying  
“ the said fleet of merchant vessels, had determined  
“ to seize and detain as many of the *American*  
“ vessels and their cargoes in the said fleet as he  
“ could, that were not protected by *British* licences;  
“ and the deponent has not the least doubt, but  
“ verily believes that the respective commanders  
“ of the *Aquilon* and *Devastation* intended doing  
“ the same thing. That about nine o’clock in the  
“ morning of the said 12th day of *August*, the  
“ deponent being again upon deck and the weather  
“ having become much clearer, he plainly saw,  
“ without the help of a glass, the said ships forming  
“ or composing the said fleet, which were then  
“ still under weigh, and having then taken a glass  
“ to view the said ships, he could and did then  
“ plainly see and distinguish the several ships of  
“ war (being the convoying ships) from the  
“ merchant ships in the said fleet, and he has no  
“ doubt that the same could have been and were  
“ as plainly seen and distinguished by those on  
“ board the *Aquilon* and *Devastation*, as they were  
“ by the deponent and others on board the *Meteor*,  
“ at which said time he thinks that the said fleet,  
“ which was still standing to the westward towards  
“ the said three ships at anchor, was within about  
“ six or seven miles from them, for there had been  
“ but little wind from the time when the said fleet  
“ was first discovered as aforesaid, and the said  
“ fleet had closed but very little with the said  
“ three ships at anchor; but it was then ascer-  
“ tained



“ tained to a certainty (of which, however, no  
“ doubt had been before entertained), that the  
“ said fleet was a large convoy under the pro-  
“ tection of several of his majesty’s ships of war.  
“ That about ten o’clock of the same morning, to  
“ the best of his recollection as to time, the  
“ weather having become quite calm, the aforesaid  
“ convoy was observed by the deponent, and by  
“ the commander and the rest of the officers of the  
“ *Meteor*, to come to an anchor between the island  
“ of *Femerin* and the *Trendelen Reef*, at the distance,  
“ as he thinks, of about six or seven miles from  
“ the said three vessels, the *Aquilon*, *Meteor*, and  
“ *Devastation* ; and it was a matter of surprize to  
“ the deponent and the commander and officers of  
“ the *Meteor*, what could cause the said fleet so to  
“ come to an anchor ; for although the weather  
“ had become calm, yet the tide was in favor of the  
“ said fleet getting further on its voyage and to a  
“ better anchorage, by continuing under weigh,  
“ which in the deponent’s opinion and judgment  
“ ought to have been done.” Captain *Wilkinson*,  
however, the commander of the convoy, thought  
otherwise, and I dare say he had very good reason  
for bringing the convoy to an anchor where he  
did.

Upon the whole I think the result is that the  
fact of sight is sufficiently proved ; and as it is the  
necessary intendment of the law that the officers  
commanding His Majesty’s ships have at all times  
the *animus capiendi*, I shall pronounce for the  
interest of the three vessels claiming to be entitled  
to share as joint-captors.

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May 2d, 1815,

## RATTLESNAKE, MAFFET.

May 6th, 1815.

A claim of joint-capture cannot be supported, where the chase has been abandoned before the act of capture is consummated.

THIS was the case of an *American* privateer, which sailed from *Bayonne* upon a cruize on the 18th of *June* 1814, and between 10 and 11 o'clock in the morning of the 25th of the same month, was observed by His Majesty's ship *Hyperion*, *William Price Cumby* Esquire, Commander, which immediately made all sail in chase; and between five and six o'clock in the morning of the 26th, effected the capture, no other ship being in sight at the time. A claim of joint-capture was given on behalf of His Majesty's ship *Jasper*, founded on circumstances which are detailed in the judgment of the Court.

## JUDGMENT.

Sir *William Scott*.—The allegation in this case pleads “that His Majesty's ship *Jasper*, on the  
 “ 25th Day of *June* last, being in latitude 43° 13'  
 “ north, and longitude 9° 24' west, and steering  
 “ S. S. W. with the wind north, a brig, which  
 “ proved to be the *Rattlesnake*, and which had  
 “ been seen from on board the *Jasper* in the  
 “ morning of the said 25th day of *June*, by  
 “ the wind, was observed to bear up, and to be  
 “ making all sail apparently in chase of His  
 “ Majesty's said ship of war; that at 11 o'clock  
 “ A. M. of the same day, His Majesty's said ship  
 “ hauled to the wind in chase of the said brig;  
 “ that at noon, the *Bayonne* islands bore W. S. W.  
 “ distant

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“ distant eight or nine leagues, latitude  $42^{\circ} 19'$   
 “ north; that at  $12^{\circ} 30'$  the said brig, being within  
 “ about two gun-shots of His Majesty's said ship  
 “ *Jasper*, hauled to the wind on the larboard tack,  
 “ and at one o'clock tacked.” It proceeds to state  
 that “ shortly afterwards a frigate, which proved to  
 “ be His Majesty's ship *Hyperion*, was seen to  
 “ windward, when His Majesty's said ship *Jasper*  
 “ made signals to the said frigate.” Now this  
 should lead one to suppose that it was in conse-  
 quence of these signals that the *Hyperion* com-  
 menced the chase, and one of the officers of the  
*Jasper*, who has released his interest, and been  
 examined as a witness, states that the *Hyperion*  
 was not in chase before these signals were made by  
 the *Jasper*. But that is not the account given by  
 the *American* witnesses, who are most to be relied  
 on. What the witness (*Sharp*) states is, that  
 “ about eight o'clock in the forenoon, after she  
 “ had stood off for a little while, the *Rattlesnake*  
 “ tacked and stood in shore again; and that there-  
 “ upon the said brig of war also tacked and stood  
 “ in after her; in a few minutes after the *Rattle-*  
 “ *snake* had so stood in, another vessel of war was  
 “ seen from on board to windward, coming down  
 “ upon the course of the *Rattlesnake* with all sail  
 “ set; as the said strange sail came down very  
 “ fast, she was soon discovered to be a frigate;”  
 and the other *American* witness speaks nearly to  
 the same effect: so that it is quite clear that it  
 was not in consequence of the signals made by the  
*Jasper* that the *Hyperion* commenced the chase  
 of the prize. The allegation goes on to state, that  
 “ the said brig for a considerable time ran about

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“ two points free between His Majesty’s said  
 “ frigate *Hyperion* and the *Jasper* ; but the  
 “ weather being hazy, the *Hyperion* and the  
 “ prize in question were not seen from the *Jasper*  
 “ after eight o’clock P. M.” But I think it must  
 have been at a much earlier period of time that  
 the *Jasper* lost sight of the *Hyperion* and the  
 prize, for, according to the account given by the  
*American* witnesses, the brig was lost sight of at  
*six o’clock*, or even earlier. One of the witnesses  
 says, that “ they both” (that is, the *Hyperion* and  
 the *Jasper*) “ continued in chace of the *Rattle-*  
 “ *snake*, and pursuing the same course, until  
 “ about *six o’clock* in the evening, when they  
 “ lost sight of the brig.” And the other wit-  
 ness (*Fellman* the sailmaker) says, that “ the brig  
 “ continued in chace, keeping rather under the  
 “ lee of the *Rattlesnake* ’till she dropped astern,  
 “ but she was in chace ’till *between five and*  
 “ *six o’clock* in the afternoon, at which time  
 “ the *Rattlesnake* had run her out of sight.” In  
 the allegation it is averred that “ the *Jasper* con-  
 “ tinued in chace all the night in a west course,  
 “ which did not differ half a point from the course  
 “ steered before dark.” It turns out, however,  
 upon the evidence, that the *Jasper* had quitted the  
 chace before the act of capture was consummated,  
 and having given up the pursuit as desperate, was  
 proceeding for her port of destination. If the  
*Jasper* had continued in chace, although not in  
 sight, I should have held that she was entitled to  
 share in the prize. But the fact is, that the *Jasper*  
 had not only, in consequence of her being a heavy  
 sailer, lost sight of the prize, but that she had  
 actually

actually abandoned the chase, and was pursuing her course with a different object in view. Abandonment of pursuit is, according to the general rule, abandonment of the benefit to be derived from it, and there must be strong circumstances indeed to form a case of exception to this general rule.

It is said that the claim of the *Jasper* may be supported upon the ground of association,—that the vessels were engaged in one and the same enterprize, and that so intimate was their union that *private signals were exchanged* between them. But the association, if such it is to be deemed, appears to have been of a very casual nature, and to have had no previous existence. Both the vessels, in the first instance, chased *separately and distinctly*, though they afterwards joined in the pursuit. The association extended no farther than the pursuit of the prize in question, and when that pursuit ceased on the part of the *Jasper*, the association ceased at the same moment of time.

It is said that the *Jasper* was ordered to steer in a particular direction, and that by the course she pursued, and the position she took, she contributed to the capture, and I have little doubt that she did so to a certain extent; but it appears that the assistance of this sort was very limited, for, according to the testimony of the *American* witnesses, it was the superior sailing of the *Hyperion* that settled the business. *That it was* which the witnesses understood to be the efficient cause of the capture. I am not aware that it has ever been laid down that any little assistance rendered by one vessel to another in the early part of a chase, such, for instance,

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When two vessels associate in pursuit of a prize, if either of them ceases from the pursuit, the association ceases at the same time.

A little assistance, rendered by one vessel to another in the early part of a chase, gives no title to share in the prize.

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instance, as causing the prize to change her course, would give an interest to the vessel rendering such assistance; I think the contrary has always been held as the correct rule upon the subject. The case of the *Empress* (vol. i. p. 268.) which has been cited, appears to me to have no direct bearing on the question; *That* was a case in which two of His Majesty's ships, meeting casually with each other, discovered two vessels of the enemy steering in different directions, and in order, if possible, to effect the capture of both of them, the officer who was superior in command, directed one of the king's ships to pursue one of the enemy's vessels, whilst he went in chace of the other; one of these ships effected the capture of the vessel of which she went in pursuit, but the other did not. The Court there was of opinion that there was a joint enterprize and a distribution of force for the purpose of capturing both the enemy's vessels. There was no abandonment of the common pursuit, for *a common pursuit it was, though of separate objects*: Here is not only an abandonment of the pursuit, but a return to the business on which the ship was engaged before the pursuit began. Here was a total discontinuance of the chace before the capture was made, and therefore I must pronounce against the claim of the *Jasper* to share in the prize.

## ALEXANDER, CRANE.

THIS was the case of a *British* ship laden with a cargo of fruit, wine, oil, and other merchandize, belonging to subjects of the Grand Duke of *Tuscany*, and also having on board a marble monument, the property of the King of *Prussia*, intended to be erected in memory of his late Queen. The ship and cargo were captured on the 14th of *November* 1814 by an *American* ship of war, whilst in the prosecution of a voyage from *Leghorn* to *Hamburgh*, and were recaptured, on the 23d of the same month, by a *British* privateer.

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The property of an allied sovereign, recaptured from the enemy, restored free from salvage or expences.

The Court decreed restitution of the ship, on payment of the usual salvage to the recaptors, and of the cargo, on payment of expences without salvage; It further directed, that no part of the expences should be charged on the property of his majesty the King of *Prussia*.

EXPERIMENTO, GARCIA,  
Formerly EXPERIMENT, RUTHERFORD.  
(Instance Court.)

May 11th,  
1815.

The Court of Admiralty has power to enquire into the title in cases in which British subjects lay claim to a ship coming to this country in the possession and as the property of foreigners.

THIS was a cause of possession, civil and maritime, promoted by *Charles Campbell, James Bowden, and James Edmondson*, the executors of the late *Samuel Donaldson* of *London*, who in the year 1806 became the sole owner and proprietor of this ship, under a purchase made from the commissioners for the management of *Prussian* property, for the sum of £3,100.

In the beginning of the year 1812, Mr. *Donaldson* sent the ship, under the command of *James Rutherford*, to *Nassau* and *Amelia Island*, for the purpose of bringing home a cargo of timber. After the cargo had been put on board, and whilst the vessel was lying in *Saint Mary's River*, intelligence was received that hostilities had commenced between *Great Britain* and the *United States of America*. The master, being apprehensive of capture by *American* cruizers, determined to put to sea immediately, but in endeavouring so to do his vessel grounded upon the bar of the river, in which situation she was deserted by the mate and the rest of the crew, the master himself being the only person left on board. On the following day the ship floated, and he then contrived to run her upon the mud on *Tiger Island*, within the limits of the *Spanish* territory. Two days afterwards she was taken possession of by an *American* gun-boat, and carried into *Saint Mary's*, and there put into a place of security.

Proceedings



Proceedings were afterwards instituted against her in the admiralty court at *Savannah*, but an Act of Congress having about that time passed, authorizing the President of the United States to grant passports to all the *British* ships that might happen to be in the ports of *America*, this ship and several others were claimed on behalf of the *British* subjects to whom they respectively belonged. The claims thus made were referred by the Admiralty Court to the executive government, and being again sent back to that Court for legal decision, the Judge pronounced the claimants to be entitled to the benefit of the act of Congress, and issued his order for granting the necessary passports. Several months elapsed before this decision took place, during which the ship, which had sustained very material loss and injury in her hull, sails, and rigging, remained in the custody of the Marshal of the Court, who applied to the *British* Vice-Consul at *Savannah*, for payment of the expences occasioned by her detention, but the Vice-Consul declined to advance the money, being apprehensive that the ship, in consequence of the injuries she had suffered, would not sell for a sufficient sum to defray the amount of charges demanded by the Marshal. On the 20th of *February* 1813, the Judge issued his decree or order “con-  
“demning and permitting the sale of the said ship,” provided the costs and charges upon her should not be paid within a time specified for that purpose. The expences not having been paid within the time limited, the Marshal of the Court advertised the ship for sale, and she was sold at public auction, under his authority, for the sum of 900 dollars, to  
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the house of *Hibberson & Co.* the present claimants, to whom a bill of sale was stated to have been duly executed by the Marshal. She was afterwards removed to the port of *Fernandina* in *Amelia Island*, where the original bill of sale was delivered up to the Governor of *East Florida*, and an act of naturalization passed, by which she was adopted as *Spanish*, and received the name of the *Experimento*. After this, the ship, documented as a *Spanish* ship, and as the property of the *Spanish* house of trade by whom she had been purchased, made a voyage from *Amelia Island* to *Liverpool*, and back again to *Amelia Island*, from which she came on her present voyage to *Portsmouth*, where she was arrested at the suit of the executors of Mr. *Donaldson*.

The *King's Advocate* and *Adams*, for the executors, argued that a *British* registered owner ought not to be divested of his property without good and sufficient proof that it had been legally transferred to some other person. They admitted that if the ship had been regularly condemned by an *American* Prize Court of Admiralty, and sold, under the sentence of condemnation, to a neutral, the title of the former owner would be defeated; but they contended that in this case there was no proof of any regular judicial proceeding in an *American* court of justice. The *American* government, they said, had ordered the vessel to be restored to its *British* owner, and they asked nothing more of the Court than to enforce this order of the *American* government; that there was no sufficient proof that the *American* court had ordered the ship to be sold

sold for payment of the expences incurred by its detention, much less that it had condemned it as prize. That no decree of the Court ordering the sale, nor any bill of sale signed by the marshal, or any other person having competent authority, was produced. That the decree of the Court, or an authentic copy of it, and the bill of sale itself ought to have been produced, and that the mere recital of them, in another instrument, could not be taken as any legal proof that they ever had existence. That the purchase money for the ship was much less than its real value, and the pretended sale altogether fraudulent and collusive. That the title of the *British* owner, having never been legally divested, his executors were entitled to be put into possession of the vessel by the order of this Court.

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For the *Spanish* owners, *Arnold* and *Lushington* argued, to the effect of the observations contained in the judgment of the Court.

#### JUDGMENT.

Sir *William Scott*.—This ship was arrested on the 1st of *April* last, at the suit of three *British* subjects, the executors of Mr. *Donaldson*, who was at one time its undoubted owner. Three several defaults had been granted, according to the regular mode of proceeding in such causes; and the fourth default was about to be granted, when an appearance under protest was given on behalf of Messrs. *Hibberson* and *Young*, asserting themselves to be the *Spanish* owners of this ship. On the next following day, however, their protest was waived;

so

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so that there is no longer any question as to the jurisdiction of this Court.

In cases in which *British* subjects have set up a claim to vessels coming into the ports of this country in the possession and as the property of foreigners, the power of the Court is not so circumscribed that it may not enquire a little into the title by which the property is held. It has not considered itself so universally bound to abstain from entering into the question of title, and there is good reason why it should not, for if the *British* claimant cannot have justice done him here, he certainly cannot procure it elsewhere. I hold myself therefore at liberty to interfere in questions of this kind so circumstanced; especially where there is any appearance of fraudulent or piratical practices by the party in possession of the vessel.

In considering this question, it is material, in the first place, to look at the prayers of the parties as contained in the act on petition which they have given in. For the *Spanish* owners it is prayed that the warrant of arrest may be superseded, and that the parties at whose instance it issued may be condemned in the costs of this proceeding. On the other side it is prayed that possession of the ship may be delivered to the executors of the *British* owner, and that the *Spanish* claimants may be condemned in the contumacy fees, &c. The parties respectively pray all that the Court has the power of doing, and it is therefore I think impossible, after this, that I can hold that these are mere initiatory proceedings. It would be perfectly inconsistent with the shape

and character which the cause has assumed, if I were not to do something further. I am of opinion that the case is already ripe for decision. And, if it be true, as it has been represented, that this ship is detained at a very considerable daily expence, it is the more incumbent on the Court to proceed as speedily as possible to its final adjudication. The parties have already gone into the merits of the case, and I shall certainly not now indulge them with permission to go further into them by stating and proving other facts.

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Then what are the facts now before the court? It is stated by the *Spanish* claimants, and indeed by the executors of the *British* owner likewise, that the ship was at *Amelia Island* when hostilities broke out between *Great Britain* and *America*; that the master was desirous of getting away in order to avoid capture; and that in endeavouring so to do, the vessel got upon a sandbank at the mouth of the river. That it seems was the first misfortune that befel this vessel. She was afterwards captured by an *American* gun-boat, carried into *St. Mary's*, and proceeded against in the court of admiralty at *Savannah*, and I can have little doubt, although there certainly is no sufficient evidence of the fact, that what then took place was in the nature of a prize proceeding. However, it seems that there was an act of congress passed, authorizing the president of the United States to grant passports to *British* ships in *American* ports to return to their own country. The benefit of this act was claimed for this among other ships; and after some doubt and delay, the court of admiralty came to a legal decision upon the question, and ordered

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ordered passports to be granted, that is, in point of fact, It ordered the vessel to be restored : but several months had elapsed, and the vessel had sustained much damage ; her boat, cables, anchors, and rigging had been plundered or lost. Considerable expences had been incurred whilst the vessel was in the custody of the marshal, who applied to the *British* Vice-Cousul for the payment of them, and offered to give him up the ship. He, however, declined taking possession, being apprehensive it would not be worth the sum to which the expences amounted. Under these circumstances, the marshal applied to the court for a decree of sale ; and the court decreed that the vessel should be sold, unless the expences were paid within a certain time. The expences were not paid within the time limited ; and the marshal sold the vessel at public auction for 900 dollars. A bill of sale is said to have been given by the marshal to Messrs *Hibberson* and *Young*, the purchasers, which they exhibited to the proper *Spanish* authorities ; and thereupon an act of naturalization, as it is called, was granted for the vessel, in which the bill of sale was recited. The ship afterwards made a voyage to *England*, where she delivered her cargo, and then returned to *Amelia Island*, from whence she again came to this country. It is also stated by the *Spanish* claimants, that a treaty of peace has been concluded between this country and *America*, since the proceedings in the admiralty court at *Savannah*, which they assert to be a confirmation of their title, and they pray the possession to be continued to them.

On the other side it is stated, that the vessel,  
being

being *British* property, went to *Amelia Island* for the purpose of bringing back a cargo of timber ; and that upon the breaking out of hostilities she endeavoured to escape, and in so doing grounded on the bar of *Saint Mary's River*, where she was deserted by the whole of the crew, with the exception of the master. So far the statements of the parties are concurrent ; they agree likewise in stating that the master ran the vessel upon the mud in *Tiger Island* within the *Spanish* territory, and that she was there captured by an *American* gun-boat and carried into *Saint Mary's*. It seems to follow, almost as a necessary inference, that proceedings were instituted against the ship in an *American* court, and that those must have been prize proceedings. Indeed I do not understand that there is any denial that a proceeding did take place, but the parties say that it ended in a sentence of restitution and not of condemnation. They deny that there was any sale of the vessel by the owner or his agent, but I am at a loss to understand what may be the use of such a denial, for I do not find that any such sale is alleged to have taken place. I expected to have found it denied that the ship was sold by the authority of *the Court of Admiralty*, but all that they venture to say is, that it was not sold by any *competent authority*. The denial of *the competency of the authority* under which the ship was sold amounts, I think, to a sort of admission that a sale did, in fact, take place by order of the court. Am I to understand that such a perfect indifference prevailed about the fate of this vessel that no enquiries were made respecting it, that no information was sent by the  
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consignees to the owner, and that he remained in ignorance whether there was any sale of the ship or not. The fact is averred on oath, and not being at all denied, I must take it as proved, and can only enquire into the competency of the authority which ordered the sale. It is alleged that the other parties are not *Spaniards*, but that they are in reality *British* subjects; supposing it were so, what difference could that make if the transaction is a *bonâ fide* transaction. It is said that they took advantage of the absence of the master, who, after staying some months, was obliged to return to *England*. Now I must say that this is one of the most unaccountable parts of this transaction, that the master should have quitted the ship in the way he did, without putting her in the care of any person. I must suppose that he advised his owners of the necessities of himself and of the ship; and if he did so, and those necessities were not supplied, the owner must take the consequences. If no remittances were made for the payment of the expences incurred, whose fault was that? If you do not, by yourself or agent, take care of your property, who can help it? other parties are not to be prejudiced by your negligence. It is averred that the *Spanish* claimants *contrived* to get a pass for this ship, but no explanation is given of the nature of the *contrivance* which is imputed to them. The purchase, also, it is said, was a mere *contrivance and collusion*.—But how so? What was *the contrivance*, what *the collusion*? The ship was sold by the authority of the court and purchased at an open and public sale. This mode of disposing of property by public sale, under the authority of a court



court of justice, may be and not unfrequently is disadvantageous to the parties on account of the expences with which it is attended, but it is as little likely to be fraudulent and collusive as any mode of sale that can be adopted. The *American* court had a right to do what this Court is in the habit of doing, namely, of decreeing the sale of a ship for the payment of expences. I have no doubt therefore of the competency of the authority under which the ship was sold.

Then as to the value of the ship, and the price for which it was sold. The amount, it must be confessed, is very small, and indeed somewhat startling, but it is to be remembered that the ship had been abandoned and left to its fate by the owner and his agents, and that she was in every respect much deteriorated.

I have no hesitation in ordering this warrant to be superseded, but under all the circumstances of the case I am not inclined to give costs.

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## ACTEON, ROGERS.

May 11th  
1815.

What is the due  
measure of res-  
titution to per-  
sons making out  
a legal claim to  
property de-  
stroyed by  
captors.

THIS was the case of an *American* ship, which, on the 24th of *January* 1813, sailed from *Norfolk* in *Virginia* to the port of *Cadiz*, laden with a cargo of about 4,200 barrels of flour, which had been shipped under a *British* \* licence, dated the 13th of *August* 1812, and was to be in force for nine months from the time of its date. On the 27th of *February*, the vessel arrived at *Cadiz*; and the master having delivered his cargo, produced the licence under which he had sailed to the *British* Minister resident at that place, who granted him a further licence, permitting him to

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\* In the year 1812, the *British* government being very desirous that the port of *Cadiz* should receive a constant supply of *American* flour, granted numerous licences, authorizing any vessels, except *French* vessels, being unarmed, and not less than 100 tons burthen, and bearing any flag, except that of *France*, to import into *Cadiz*, from any port of the United States of *America*, cargoes of grain, meal, flour, or rice, without molestation on account of any hostilities which might exist between His Majesty and the United States, notwithstanding such ships and cargoes might be the property of any *American* citizens, and to whomsoever the same might belong, and to receive their freight, and to return to any port not blockaded, upon condition that the names and tonnage of the vessels, and the names of the masters should be endorsed on such licences at the time of the vessels clearing from their ports of lading; and such licences were to be in force for nine months from the time of their date. These licences were transmitted from this country, by the various merchants, brokers, or agents who applied for them, to the United States of *America*, where they were disposed of, and used as occasions might require.

ship

ship a cargo of lawful merchandize, and to return with it to any port in the United States of *America*. The master having taken on board a few boxes of fruit, four quarter casks of wine, and some other trifling articles, set sail on the first of *April*, bound to *Boston* in *America*. In the course of his voyage, he was boarded by several *British* ships, the commanders of which examined his licence, and permitted him to proceed on his voyage, which he accordingly did until about noon of the 12th of *May*, when he was captured by His Majesty's ship *La Hogue*, commanded by the honourable Captain *Capel*, who, on the evening of the same day, set fire to the vessel and destroyed it.

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ACTION.

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A claim was given for the ship and cargo as the property of citizens of the United States of *America*, protected by licences granted by His Majesty's Government, and by his Excellency the Minister plenipotentiary of *Great Britain* at the Court of *Spain*; and, at the instance of the claimant, a monition was issued, calling upon the captors to proceed to the legal adjudication of the ship and cargo. An appearance was given under protest for the captor, and the case now came on for hearing. It was understood that the captors did not contend against a sentence of restitution; but objected to the payment of costs and damages.

*For the Captors.*—The *King's Advocate* and *Adams* argued that costs and damages were not to be awarded against captors, except there was full proof that they had been guilty of wilful misconduct. That the transfer of *British* licences from one vessel to another, and the traffic carried

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*ACTEON.*

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on in the sale and purchase of them, was such as to render the use of the licences liable to great suspicion, and imposed a duty upon the king's officers, to exert their utmost vigilance in detecting the frauds attempted to be practised under them : that the master acknowledged he had paid the sum of 500 dollars for the purchase of the licence under which the *Acteon* was found sailing : that she had letters on board addressed to persons resident in *America* from Officers belonging to an *American* squadron of war by whom she had been boarded only two or three days previous to the capture : that the voluntary conveyance of letters, which must be supposed hostile in their contents, in a vessel enjoying the benefit and protection of a *British* licence, was by no means an innocent act ; that the time for which the original *British* licence was granted, would have expired on the very day after the capture took place, and before the vessel could have completed her voyage : that the expiration of a licence was in all cases held to be a justifiable ground of seizure ; and such as to entitle the captors to the payment of their expences, instead of causing their condemnation in costs and damages : that Captain *Capel* must be presumed to have acted from a sense of duty only ; it being quite obvious he could have no personal interest in the destruction of the vessel, and that he was thereby defeating all chance of benefit which he might otherwise have derived to himself from the capture : that in consequence of a strong squadron of *American* ships, then under the command of commodore *Rogers*, being near to Captain *Capel's* station, it was impossible

ble that he could, consistently with his duty, weaken his crew by putting a prize master and men on board the *Acteon* to conduct her to a *British* port; nor, consistently with his orders, allow her to proceed to *Boston*, as the exact strength and position of his own squadron would thereby have been communicated to the *American* government, and this communication might have proved very injurious to the public service, in which he was engaged: that the papers of the *Acteon* were put on board another *American* vessel which had been captured for the purpose of being carried into *Halifax*; but the prize having been recaptured by the *Americans*, it was out of the power of the captors, to produce the ship's papers: that the seizure of the ship and cargo, being justified by the circumstances under which she was taken, and the public service rendering it necessary that she should be destroyed, the captors were not bound to proceed to adjudication.

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*Jenner and Lushington contra.*—

#### JUDGMENT.

Sir *William Scott*.—This question arises on the act of destruction of a valuable ship and cargo by one of His Majesty's cruizers. On the part of the claimants restitution has been demanded, and there can be no doubt that they are entitled to receive it; indeed I understand that it is not now opposed by the captor himself; but it remains to be settled what is to be the measure of restitution,—how far it is to be carried. The natural rule is, that if a party be unjustly deprived of his property he ought to be put as nearly as possible in the same state

The general rule is, that a person unjustly deprived of his property is entitled to restitution, with costs and damages, but this, like all other general rules, is subject to modification.

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The measure of  
restitution to the  
claimant is the  
same, whether  
the captor has  
acted from im-  
proper motives  
or otherwise.

state as he was before the deprivation took place ; technically speaking, he is entitled to restitution, with costs and damages. This is the general rule upon the subject, but like all other general rules it must be subject to modification. If, for instance, any circumstances appear which shew that the suffering party has himself furnished occasion for the capture, if he has by his own conduct in some degree contributed to the loss, then he is entitled to a somewhat less degree of compensation, to what is technically called simple restitution.

This is the general rule of law applicable to cases of this description, and the modification to which it is subject. Neither does it make any difference whether the party inflicting the injury has acted from improper motives or otherwise. If the captor has been guilty of no wilful misconduct, but has acted from error and mistake only, the suffering party is still entitled to full compensation, provided, as I before observed, he has not by any conduct of his own contributed to the loss. The destruction of the property by the captor may have been a meritorious act towards his own government, but still the person to whom the property belongs must not be a sufferer. As to *him*, it is an injury for which he is entitled to redress from the party who has inflicted it upon him, and if the captor has by the act of destruction conferred a benefit on the public he must look to the government for his indemnity. The loss must not be permitted to fall on the innocent sufferer.

Where the terms  
of a licence are  
*general*, it is of  
no consequence  
who are the indi-  
viduals acting  
under it.

This *American* vessel having been invited into the service by the government of this country, had carried a cargo of corn to the port of *Cadiz* for the  
use

use of the army, which at that time stood greatly in need of a supply. It is true that the licence which had been here granted in the usual manner had afterwards been purchased for money in *America*, but I do not see what difference *that* can make in the consideration of this case, for if the licence was *general*, which it appears to have been, it could be of no consequence who were the individuals who acted under it, provided they complied with the conditions annexed to it; there is nothing whatever to shew that the parties acted otherwise than in strict conformity to the spirit and letter of the original licence, signed by the Secretary of State in *London*, and I must presume that they did so from the circumstance of their obtaining permission from the *British* minister in *Spain* to carry back a cargo to *America*.

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Let us now look a little to what has been said in justification of the capture and destruction of this vessel. Why, it is said in the first place, that Captain *Capel* found the transfer of these licences from one vessel to another rendered such cases suspicious, and made it necessary for him to use great vigilance in *detecting* them; but *That* did not at all impose upon him a necessity of *destroying* the vessels which were furnished with them. It is said, that the master acknowledged he had bought the licence, but supposing the fact to be that he had done so, *that* alone would not render the transaction illegal: neither could the circumstance of the expiration of the time for which the licence was granted have had any such effect, even supposing the fact to have been so, which it was not. It has been urged too that there were

A captor, although actuated by a sense of public duty only in destroying the property he has taken, is nevertheless responsible in the fullest extent to the claimant, and must look to his own government for indemnification.

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letters on board to *America* from the officers of commodore *Rogers's* squadron. What were the contents of those letters does not at all appear ; but, in the absence of all proof to the contrary, I must presume that they were of an innocent kind, and addressed to private individuals, for if they had been of a public nature and of a dangerous tendency, I can have no doubt that they would have been preserved by Captain *Capel*, and exhibited in this cause. Lastly, it has been said that Captain *Capel* could not spare men from his own ship to carry the captured vessel to a *British* port, and that he could not suffer her to go into *Boston* because she would have furnished important information to the *Americans*. These are circumstances which may have afforded very good reasons for destroying this vessel, and may have made it a very meritorious act in Captain *Capel*, as far as his own government is concerned, but they furnish no reason why the *American* owner should be a sufferer. I do not see that there is any thing that can fairly be imputed to the owner as contributing in any degree to the necessity of capturing or destroying his property, and I think, therefore, that he is entitled to receive the fullest compensation from the captor. It does not appear that Captain *Capel* is chargeable with having acted from any corrupt or malicious motive, and if, as I believe to have been the case, he has acted from a sense of duty and of obedience to the orders he received, I can have no doubt that he will be indemnified upon a proper representation being made to the government. But this will not affect the right of the *American* claimant, whom  
I must



I must pronounce to be entitled to restitution with costs and damages, and I beg it may be understood that I do so without meaning in the slightest degree to throw any imputation on the conduct and character of Captain *Capel*, but merely for the purpose of giving a due measure of restitution to the claimant.

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The *Rufus, King*,—was the next case which came on for hearing.

The Court said, I cannot distinguish this case from the last, and must therefore make the same decree.

In another case, the *William, Howard* master, simple restitution had been decreed on a former day, but the licence in that case was rather doubtful in point of authority, and the capture under the circumstances considered to be justifiable.

## SOMERSET, METHERELL.

May 11th,  
1815.

A British ship and cargo, taken by an American privateer, within the time allowed for hostile capture by the treaty of peace, and re-taken after the expiration of that period, restored to the American captors.

THIS was the case of a *British* ship and cargo, which, in the prosecution of a voyage from *Alicant* to the port of *Bristol*, was taken in latitude  $41^{\circ}48'$  north, and longitude  $9^{\circ}$  west, by the *American* private ship of war *Macedonian*, on the 7th of *March* 1815, after the ratification \* of the treaty of peace between the two countries, but *within* the time (30 days) allowed by the treaty for captures in the part of the world in which this seizure took place. On the 31st day of the same month of *March*, the vessel was retaken by His Majesty's

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\* The treaty of peace, between *Great Britain* and the United States of *America*, was signed on the 24th of *December* 1814, and was finally ratified on the 17th of *February* 1815.

The third clause in the treaty is to the following effect : “ Im-  
 “ mediately after the ratification of this treaty by both parties, as  
 “ herein-after mentioned, orders shall be sent to the armies,  
 “ squadrons, officers, subjects, and citizens of the two powers,  
 “ to cease from all hostilities ; and to prevent causes of com-  
 “ plaint which might arise, on account of the prizes which may  
 “ be taken at sea after the ratification of this treaty, it is recipro-  
 “ cally agreed, that all vessels and effects, which may be taken  
 “ after twelve days from the said ratification, upon all parts of the  
 “ coast of *North America*, from the latitude of 28 degrees north  
 “ to the latitude of 50 degrees north, and as far eastward in the  
 “ *Atlantic Ocean* as the 30th degree of west longitude from the  
 “ meridian of *Greenwich*, shall be restored on each side ; that the  
 “ time shall be thirty days in all other parts of the *Atlantic Ocean*  
 “ north of the equinoctial line or equator, and the same time for  
 “ the *British* and *Irish* channels, for the *Gulf of Mexico*, and all  
 “ parts of the *West Indies*.”

ship

ship of war *Erne*, in latitude 46° north, and longitude 27° 50' west, *after* the period specified in the treaty of peace for captures had expired.

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The Court decreed restitution of the ship and cargo to the *American* captors.

### The KING against KITTO.

THIS was a proceeding under the statute\* against the master of a small trading vessel, for deserting the convoy under the protection of which he had been sailing. The man confessed himself guilty of the offence with which he was charged, and offered an affidavit in mitigation of punishment. It appeared, that he had been committed to the marshalsea prison on the 18th of the present month, and that he had been in the custody of the marshal some time before he was sent to the prison. It likewise appeared that he was insolvent.

May 30th,  
1815.  
Desertion of convoy punished by imprisonment of the master for one month.

The Court ordered him to be imprisoned for one month from the time of his being arrested, but, in consequence of the circumstances set forth in the affidavit, did not impose any fine upon him.

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\* 45 G. 3.

## FORTITUDO, HENRICKSON.

(Instance Court.)

June 6th,  
1815.

Parties who have abandoned a former suit instituted by them to compel payment of certain alleged bottomree bonds, will not be permitted, unless on strong grounds shewn, to carry on proceedings a second time to enforce a demand founded on the very same bonds.

**T**HIS was the case of a *Danish* ship, which, in the prosecution of a voyage from *Naples* to *Plymouth*, and for orders, with a cargo of oil the property of *Scott, Burne, & Co. of London*, was, in the month of *October* 1813, captured by one of His Majesty's cruizers and carried into *Gibraltar*, where she was soon afterwards given up by the captors to *Jorgen Jordt Henrickson*, who was then the master and also part owner of the vessel. *Henrickson*, in order to defray the expences incurred at *Gibraltar*, borrowed of Messrs. *Lindbladt & Co.*, who were the agents and correspondents of *Scott, Burne, & Co.* the sum of £217, for which he executed a bond of hypothecation, on the *ship* and *freight*, for £297, including the interest on the money advanced. The vessel then proceeded on her voyage towards *England*, but in the prosecution of it having met with damage at sea, the master, at the suggestion of his officers and crew, put back to *Gibraltar*, at which place, after a survey made in the usual manner, the cargo was landed, and the damages which the ship had sustained were repaired. The expences were again defrayed by Messrs. *Lindbladt & Co.*, who, to secure the repayment of the same, took from the master a bond for £3,047. 14s., hypothecating the *ship, cargo, and freight*. The vessel afterwards proceeded on her voyage to this country, and arrived in safety at *Bristol*, where the cargo was delivered to the agents of *Scott, Burne, & Co.*  
the

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the owners of it, but without the payment of the freight which was due for its transportation. The master at first declined to deliver the cargo without receiving his freight, but afterwards consented to do so, on receiving an assurance from the agents that the matter should be amicably adjusted. *Scott, Burne, & Co.*, as soon as they had got possession, caused the following proceedings to be instituted in the Court of Admiralty:—On the 5th of *July* 1814, an action against *the ship* was entered by them as the legal holders of a bottomree bond, being the first of the bonds granted at *Gibraltar*. On the 11th of *July*, they entered a further action against the *ship* and *freight*, as the lawful agents of *Lindbladt & Co.* holders of a bottomree bond, being the second bond granted at *Gibraltar* on the *ship, cargo, and freight*. The warrants of arrest were executed in the usual manner, and the master delivered his protest, surveys, and freight account, to Messrs. *Windle*, his brokers, who submitted them to a person at *Lloyd's* coffee-house, that he might make out the average account between the ship, freight, and cargo, and he accordingly made out the account and delivered it, with the documents, to *Scott, Burne, & Co.* who objected to the amount charged for the freight. The master at first offered to leave the matter to reference, but this was objected to by *Scott, Burne, & Co.*, and he then, in order to prevent the detention of his ship, consented to take their own account of freight, upon which they withdrew their actions, and promised (according to the master's statement) that the bonds which were in the hands of their agent at *Bristol* should be given up. The cause was then alleged to be settled, and a  
supersedeas

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supersedeas decreed in both actions. The master soon afterwards caused the ship to be advertised for sale, but there being no offer of purchase, he, in the month of *September* following, agreed to charter her to Messrs. *Harford* and *Visger* of *Bristol*, to proceed to *Amelia Island*, the *Havannah*, and any other island in the *West Indies*, and any part of *South America*, and back to any port in *Europe*. *Thomas Clausen* was then appointed master. *Harford* and *Visger* advanced £800 for the payment of the seamen's wages on the former voyage, and for other expences, to enable the ship to proceed on the projected voyage to *Amelia Island*, and elsewhere, and by way of security for the money so advanced by them they took a bottomree bond, signed by the late and present master. The vessel was about to proceed to sea, when she was again arrested by *Scott, Burne, & Co.* on the bottomree bonds given at *Gibraltar*, being the very same bonds under which she had been originally arrested.

On the part of Messrs. *Scott, Burne, & Co.* it was alleged that, at the urgent entreaty of the master, they had permitted the warrants of arrest to be superseded, not having at that time discovered any error or overcharge in the account of average delivered by the master, but that they continued to hold the hypothecation bonds, until the account should prove to be correct upon the final examination of it by their insurers, whose judgment had not then been obtained. That the insurers had since examined the documents, and expressed their opinion that they were not liable to pay, on the ground, as was understood and believed, that the ship was not sea-worthy when she sailed, and the

average loss incurred. That they found it necessary for their own security again to arrest the ship, conceiving that the same ground which would exonerate the insurers would exonerate themselves from the payment of the average. It was alleged also that no demand had been made for the delivery up of the bonds, and that the master could never have considered the bonds discharged whilst they remained in the hands of their agent.

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#### JUDGMENT.

Sir *William Scott*.—The proceedings in this cause commenced by a warrant of arrest of the ship at the instance of Messrs. *Scott, Burne, & Co.* the holders of a bottomree bond, and were followed up by another warrant of arrest, at the suit of the same gentlemen, as the agents of Messrs. *Lindbladt & Co. of Gibraltar*, likewise the holders of a bottomree bond. The cause was continued in the usual way until the 22d of *August* last, when it was alleged to be settled, and a supersedeas was issued at the petition of the parties who had commenced the suit, and no intimation was at that time given of any reserved question. Afterwards, on the 7th of *October*, the ship was again arrested at the suit of the same parties, and upon the very same bonds. An act on petition has been delivered, in which Messrs. *Scott, Burne, & Co.* represent that they have a right now to proceed, and praying that they may be allowed to do so, notwithstanding the declaration made by them in the former suit, that the business was settled; and notwithstanding the supersedeas issued at their instance. On the other side it is prayed that the Court will decree the ship to be released,  
and

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and that Messrs. *Scott, Burne, & Co.* may be condemned in the expences, damages, and demurrage occasioned by this suit, and the proceedings thereon.

The master's account, which to no inconsiderable extent is confirmed by that of Mr. *Fry* a partner in the house of *Scott, Burne, and Co.*, is to this effect:—" that the said ship, being in the island of "*Jersey*, was in the month of *January* 1813 chartered by him, the appearer, who was then also master thereof, to *Richard Fillis* of *Plymouth*, merchant, to proceed to *Fowey* in *Cornwall*, there to receive a cargo of pilchards, and to sail therewith to *Cagliari*, or *Naples*, and deliver the cargo agreeably to bills of lading, and to take in at said ports, or at *Gallipoli*, if required, a return cargo, and bring the same to *Plymouth* for orders, and to unload the said return cargo in a port in *England*, upon payment of a certain freight, in the charter-party stipulated, and that the said ship accordingly proceeded to *Falmouth*, and there took on board her outward cargo, and also *Stephen Robart* as supercargo, and delivered the same at *Naples*, when the said *Stephen Robart*, not having a return cargo to put on board, on account of the said *Richard Fillis*, agreed with *Bartholomew Sampson* of *Naples*, the agent of Messrs. *Scott, Burne, & Co.* parties in this cause, to put on board the said ship a cargo of oil at *Gallipoli* to their consignment at *Plymouth* for orders, to be unloaded at a port in *England* as stipulated in the aforesaid charter-party, and the said ship was ordered round to *Gallipoli* to take on board the same; and this appearer accordingly received a cargo of oil, together



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“ together with some silk, the property of the said  
 “ *Stephen Robart*, on board the said ship at *Gal-*  
 “ *lipoli*, and signed bills of lading for the same,  
 “ expressing that the freight thereof was to be  
 “ paid according to charter-party, thereby meaning  
 “ the aforesaid charter-party which he had entered  
 “ into with the said *Richard Fillis*, which was the  
 “ only charter-party he, the appearer, entered into  
 “ or was in any manner privy to for the said voyage;  
 “ and the said ship having accordingly taken in  
 “ her said return cargo, in the month of *September*  
 “ in the said year 1813, and with the said *Stephen*  
 “ *Robart* on board, sailed from *Gallipoli* on her  
 “ said return voyage; and in the prosecution  
 “ thereof, to wit, in the month of *October* following,  
 “ the said ship and cargo were captured by one  
 “ of His Majesty’s cruisers and carried to *Gibraltar*,  
 “ and shortly after their arrival they were given  
 “ up by the captors; and this appearer, to enable  
 “ him to defray the expences at *Gibraltar*, took up  
 “ of Messrs. *Lindbladt & Co.* of that place, who  
 “ represented themselves to him to be the agents  
 “ and correspondents of the said Messrs. *Scott,*  
 “ *Burne, & Co.* who were owners as well as con-  
 “ signees of the said cargo, the sum of £270 at a  
 “ premium of ten *per cent.*, as a security for which  
 “ he, the appearer, entered into a bond bearing  
 “ date the 22d *November* 1813, being one of the  
 “ bonds which is the subject of one of the actions  
 “ against the said ship in this court, whereby he  
 “ hypothecated his said ship and freight for the  
 “ payment of £297, as the amount of the said  
 “ principal and premium, to them the said Messrs.  
 “ *Lindbladt & Co.*, and the said ship then, after  
 “ waiting

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“ waiting a few days for convoy by direction of  
 “ the said Messrs. *Lindbladt* and Co., proceeded  
 “ on her voyage, and on the further prosecution  
 “ thereof, having met with considerable damage  
 “ at sea, both ship and cargo being in a very leaky  
 “ condition, he, the appearer, at the earnest en-  
 “ treaties of his officers and crew, and of the said  
 “ *Stephen Robart* the supercargo, did, for the pre-  
 “ servation of their lives and of the ship and cargo,  
 “ put back to *Gibraltar*, where she arrived on the  
 “ 5th day of the month of *December* in the said  
 “ year 1813; and he further made oath, that  
 “ surveys were then taken upon the said ship and  
 “ cargo, and a report made thereon, under which  
 “ the cargo was landed and found to be in a very  
 “ damaged state, and that the said ship and cargo  
 “ were accordingly repaired, and the repairs being  
 “ completed, the said cargo was reshipped in the  
 “ latter end of the month of *April* in the year  
 “ 1814, and the said Messrs. *Lindbladt*, & Co. the  
 “ agents and correspondents of the said Messrs.  
 “ *Scott, Burne*, & Co., the owner and consignees  
 “ of the cargo, then advanced and paid for the  
 “ said repairs of the said ship and cargo, the  
 “ warehouse rent of the cargo, and other inci-  
 “ dental expences attending the ship and cargo,  
 “ the sum of £2,650 3s. 6d.; and the said  
 “ appearer thereupon entered into the bond,  
 “ bearing date the 10th day of *May* in the said  
 “ year 1814, being the bond the subject of the  
 “ present action, whereby he hypothecated the  
 “ said ship, freight, and cargo of oil and silk laden  
 “ on board thereof, for the payment unto the said  
 “ Messrs. *Lindbladt* and Co., their executors, admi-  
 “ nistrators

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“ nistrators or assigns, of the sum of £3,047 14s.  
 “ within fifteen days after the ship’s arrival in *Ply-*  
 “ *mouth* from the said intended voyage; and he  
 “ further made oath, that the said ship on or about  
 “ the thirteenth day of the said month of *May*  
 “ proceeded with her cargo on her said voyage,  
 “ and arrived at *Falmouth* on the 11th day of *June*  
 “ following, when the appearer received orders  
 “ from the agent of the said Messrs. *Scott, Burne,*  
 “ & Co., to proceed with the said cargo to the  
 “ port of *Bristol*, there to deliver the same to  
 “ Messrs. *Haythorne & Co.*; and the said ship  
 “ arrived at *Bristol* on the second day of *July*  
 “ following; and this appearer was induced by  
 “ the representations of the said Messrs. *Hay-*  
 “ *thorne & Co.* that the said Messrs. *Scott, Burne,*  
 “ & Co. were merchants of great respectability,  
 “ who would do what was right to him, to deliver  
 “ to them the said cargo, without taking any  
 “ security for his freight, or for the payment of  
 “ such proportion of the said bottomree bond as  
 “ applied to the cargo; notwithstanding which,  
 “ as soon as the cargo was delivered, to wit,  
 “ on or about the 22d day of the said month of  
 “ *July*, the said ship was arrested by virtue of a  
 “ warrant under seal of this Court in the sum of  
 “ £500 to answer to the said Messrs. *Scott, Burne,*  
 “ & Co. as legal holders of a bottomree bond on  
 “ the said ship, being the aforesaid first bond,  
 “ dated 22d *November* 1813; and the said ship  
 “ was also arrested by virtue of another warrant  
 “ from this Court, in the sum of £3,500 against  
 “ the said ship and freight, to answer to the said  
 “ Messrs. *Scott, Burne, & Co.* as lawful agents of  
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“ the said Messrs. *Lindblatt & Co.* the holders of  
 “ a bottomree bond on the ship and freight, being  
 “ the bottomree bond on ship, freight, and cargo,  
 “ dated 10th *May* 1814; and the said warrant  
 “ was also, as he hath been informed and believes,  
 “ shewn to the said Messrs. *Haythorne & Co.*,  
 “ as persons in possession of the freight; and he  
 “ further made oath that, in consequence of the  
 “ said proceedings, he the appearer came to  
 “ *London*, and caused his protest, surveys, and  
 “ other documents relative to the damages the  
 “ ship and cargo had sustained, and the repairs  
 “ thereof at *Gibraltar*, for which the bottomree  
 “ bonds were given as aforesaid, to be submitted  
 “ to Mr. *John Winstanley* of *Lloyd's* coffee house,  
 “ *London*, who is, as he believes, a person of skill  
 “ and judgment, usually employed in the said  
 “ coffee house to make out average accounts, to  
 “ apportion the amount of the said second bot-  
 “ tomree bond on the ship, freight, and cargo  
 “ respectively; and he accordingly made out the  
 “ average account, by which it appeared that the  
 “ sum of £1,184 11s. 7d. was due from the said  
 “ cargo; and that he the said appearer then  
 “ caused his account of freight to be made out  
 “ agreeably to his aforesaid charter-party, and  
 “ the same amounted to the sum of £2,469 9s.,  
 “ which added to £1,184 11s. 7d., the amount of  
 “ average due on the cargo, made the sum of  
 “ £3,654 7s., to be due to him from the said  
 “ Messrs. *Scott, Burne, & Co.*, parties in this  
 “ cause, as owners of the cargo; of which,  
 “ after deducting the amount of the said two  
 “ bottomree bonds, viz. £3,344 14s., there re-  
 “ mained

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“ maintained a balance of £809 6s. 5d. due to him ;  
 “ and the said appearer then caused his said freight  
 “ account, the account of average, and his original  
 “ protest, surveys, reports, bills of lading, and  
 “ other documents, to be delivered to the said  
 “ Messrs. *Scott, Burne, & Co.*, who, after having  
 “ examined the same, objected to the amount of  
 “ freight, alleging that there was a different  
 “ charter-party entered into between the said  
 “ *Bartholemew Sampson*, their agent at *Naples*,  
 “ and the aforesaid *Stephen Robart* the super-  
 “ cargo, as to the freight, to that which the  
 “ appearer had entered into with *Richard Filles* as  
 “ aforesaid, and then reduced their account of  
 “ freight, according to their asserted charter-party,  
 “ which amounted to £149 5s. less than the  
 “ freight according to the original charter-  
 “ party, but made no objection to the amount  
 “ of average due on the cargo; and the said  
 “ appearer declared, as was the truth, that he  
 “ had not entered into any new charter-party,  
 “ and was not privy to any such, but had signed  
 “ the bills of lading for freight according to the  
 “ original charter-party, and he then offered to  
 “ the said Messrs. *Scott, Burne, & Co.* to leave  
 “ the matter to reference, but they the said  
 “ Messrs. *Scott, Burne, & Co.* refused to do so, or  
 “ to allow him more freight than they had stated,  
 “ and told him that if he accepted the same his  
 “ ship would be immediately released, but if he  
 “ did not accept it she would be detained until  
 “ *November*; that the said appearer then, in order  
 “ to prevent the further detention of his ship, there-  
 “ upon agreed to admit the said account of freight,

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“ and the balance then due to them according to  
“ the said account, after the said bonds were dis-  
“ charged, amounted to the sum of £169 1s., out  
“ of which they the said Messrs *Scott, Burne, &*  
“ *Co.* agreed to pay the sum of £140 1s. 5d. the  
“ expences due to Messrs. *Fox & Co.* incurred by  
“ the said ship at *Falmouth* on her arrival from  
“ her said voyage, and the balance, deducting their  
“ legal expences of the arrest, they were to pay  
“ over to Messrs. *Windle & Co.* of *London*, the  
“ bankers of this appearer; and by such settlement  
“ the amount of both bottomree bonds being dis-  
“ charged in full, they the said Messrs. *Scott,*  
“ *Burne, & Co.* agreed to withdraw the pro-  
“ ceedings against the said ship and freight, and  
“ accordingly by their instructions, as he hath been  
“ informed and believes, the original warrants were  
“ on the 19th day of *August* last brought into  
“ Court by the proctor of Messrs. *Scott, Burne,*  
“ & *Co.*, and the cause was alleged by him to be  
“ settled, and supersedeas issued in both actions,  
“ and were delivered over by the said Messrs. *Scott,*  
“ *Burne, & Co.* to the said brokers of this appearer,  
“ from whom he received the same; and he  
“ further made oath, that having arrived at *Bristol,*  
“ and considering the said bottomree bonds to  
“ have been fully discharged by the said settle-  
“ ment, he, the appearer, did in the month of  
“ *September* last charter the said ship to Messrs.  
“ *Harford & Visger* for a voyage from the said  
“ port of *Bristol* to *Amelia Island* and other places,  
“ and back to a port in the united kingdom, or  
“ other port according to order, and appointed  
“ *Thomas Clausen* as master of the said ship; but  
“ having

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“ having received no freight, the same having all  
 “ been absorbed in the said settlement of the  
 “ bottomree bonds, had no funds to pay the  
 “ seamen’s wages for their services during the  
 “ voyage from *Naples* to *Bristol*, which amounted  
 “ to upwards of £500, or to pay the port dues and  
 “ other necessary expences of the ship at *Bristol*, he,  
 “ the appearer, was under the necessity of taking  
 “ up of the said Messrs. *Harford & Visger* the  
 “ sum of £800, for which he and the said *Thomas*  
 “ *Clausen*, the master, executed a bond hypothe-  
 “ cating his said ship; and the said vessel was  
 “ about to sail on her said voyage when the said  
 “ ship was a second time arrested by virtue of two  
 “ warrants from the Court, upon actions in the sum  
 “ of £500 and £1,500 respectively, entered a  
 “ second time on behalf of the said Messrs. *Scott*,  
 “ *Burne*, & Co. in pretended causes of bottomree  
 “ bonds taken at *Gibraltar* by the said Messrs.  
 “ *Lindbladt & Co.* as aforesaid, and settled and  
 “ discharged as aforesaid, and this appearer hath  
 “ been obliged to provide for the payment of the  
 “ aforesaid sum of £140 1s. 5d., the expences  
 “ incurred at *Falmouth*, which the said Messrs.  
 “ *Scott, Burne, & Co.*, notwithstanding their agree-  
 “ ment, have refused to pay; and he lastly made  
 “ oath, that no sum whatever is due from him, the  
 “ appearer, or the other owners of the said ship,  
 “ on the said bonds, or either of them, and that  
 “ the said Messrs. *Scott, Burne, & Co.* are now in  
 “ possession of all the original protests, surveys,  
 “ reports, bills of lading, and other documents,  
 “ upon which the account of average on ship,  
 “ freight, and cargo were settled, and, notwith-  
 “ standing repeated applications have been made

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“ to them on the part of the appearer for the  
“ same, have refused and still do refuse to  
“ produce and return the same.”

These are the circumstances stated by the master in his affidavit, and they do not, in my apprehension at least, render it necessary that I should enquire how far the permission again to open a case which has once been closed, comes within the range of that large discretion with which this Court is by its commission entrusted. It might, perhaps, within the limits of that very extended equity which it is in the habit of exercising, deem it not improper in some cases to suffer a cause to be re-opened. But it certainly would not do so unless there existed very strong reasons to shew the propriety of the measure. I feel no hesitation in saying, that mere negligence or oversight would not be a sufficient ground for such an extraordinary interposition of the authority of the Court. A direct case of fraud, or something equivalent to it, must be made out before I can suffer such a step to be taken.

Let us see then whether there be any such ground in the present case. There has been no fraudulent concealment or withholding of documents. The master has sworn, and it is not denied, that he produced all the papers, and delivered them over to the other parties, who, on their own account, and as agents for *Lindbladt & Co.* must be presumed to have examined and scrutinized them. They cannot now be heard to say that they acted improvidently and without due caution. If they did so in point of fact, they must abide by the consequences of their own negligence. All that is alleged is, that they had accounts to settle with  
the



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the underwriters, and that the underwriters denied that any average was due from the cargo, on the ground, as it is believed, that the ship was not seaworthy when she sailed, and therefore refused to pay the insurance. Why what has this to do with the settlement between them and the master. As far as he is concerned it is entirely *res inter alios acta*. However right and correct the judgment of the insurers may be, the Court cannot look to that as its guide. It can only consider Scott, Burne, & Co. as the agents of Lindbladt & Co. the bondholder. But supposing that the Court could notice them in any other manner, how would the matter then stand? why, because the insurers refuse to pay *them*, therefore *They* will allow no average on the cargo in their accounts with *the master*. But the question again occurs, did you examine the accounts, and if you did not, how came you to settle them without examination? It is hardly to be conceived that you allowed them to be settled without the attention due to your own security; all that you now say is that you are dissatisfied because others have objected to them. The other party, and every body else at all connected with the ship, considered the business to be finally settled, and acted accordingly. What is there that at all leads to a contrary conclusion. Why it is said that the bonds were not given up; but they were demanded and ought to have been given up. If possession had been kept of the bonds for the purpose of enforcing any farther demands, it ought to have been stated at the time as the ground of refusal, but *that* does not appear to have been the case; the only answer then was, that they were in the hands of

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their agents at *Bristol*. The expence of this second suit has been unnecessarily and improperly incurred.

But that is not the whole of the mischief, for here has been a contract entered into with other parties for a new voyage, which has been retarded, to the inconvenience and perhaps to the no small loss of those concerned in it. Here has been other money advanced upon bottomree, on the supposition that the ship was clear from all former engagements of the same kind.

I am of opinion that there is no ground in law or equity for the commencement or continuance of these proceedings; and I think that I shall not do justice between all parties unless I condemn Messrs. *Scott, Burne, & Co.* both in the costs of the master, and of the holder of the bond granted at *Bristol*, and also in two months demurrage; and I do condemn them accordingly.

## SIR PETER, GARLICK.

THIS was the case of a *British* ship, which sailed with a cargo of fruit on a voyage from *Malaga* to *London*, and was captured by an *American* privateer, the commander of which, after taking out a part of the cargo, made a present of the remainder to *Thomas Garlick*, the *British* master, on condition of his bringing the crews of some other prize vessels to *England*: *Garlick* and his own crew, consisting of three men besides himself, and also the crews of some other *British* ships, about 20 in number, were then put on board the vessel, and she proceeded to *Falmouth*. In the course of the voyage, the vessel sprang a dangerous leak in her bottom, and it became necessary to set three pumps to work, and to clear away the cargo from the hold, in order to stop the leak. On her arrival at *Falmouth*, which she reached with considerable difficulty, *Garlick*, the master, claimed for himself a salvage for recapture from the enemy, and with the remainder of the persons on board, a civil salvage for their exertions in bringing the vessel to *England*. Two actions were entered: One in the Instance Court for the civil salvage; and the other in the Prize Court for the salvage on recapture from the enemy. The value of the ship and cargo was admitted to be £1,084 14s. 2d.

June 13th,  
1815.

Salvage on donation from the enemy, and also for exertions in bringing home the ship and cargo.

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1815.

The Court said, I shall give the master £90, and his expences; and £100 amongst the others for the services they performed: I shall likewise allow them their expences.

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## LONDON, BROWN.

June 13th,  
1815.  
Salvage on do-  
nation from the  
enemy.

THIS was also the case of a *British* ship and cargo, captured by an *American* privateer, the captain of which offered to restore the ship and cargo to the master, on condition of his drawing a bill for £1,000, payable in *London*. The master accepted the restitution on these terms, and accordingly drew a bill to that amount; but took care to send advices to *London* in time to prevent payment of it. A demand was now made by him for salvage on the cargo, as recaptured from the enemy. The value of the cargo was stated to be from £1,500 to £2,000.

The Court gave him one tenth, and his expences.

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ELLIOTTA, Master's Name unknown.

(Instance Court.)

June 13th,  
1815.

A moiety given  
to salvors in a  
case approaching  
to derelict.

THIS was the case of a *British* ship and cargo, which was discovered by His Majesty's sloop *Philomel*, on the 10th of *September* 1813, lying near the shore, about two leagues to the westward of the port of *Almazanen* in *Spain*, having all her sails loose and torn, and her main-top-mast lying over the side. Although it was then blowing very hard, Captain *Shaw*, the commander of the *Philomel*, immediately proceeded in one of his boats to the assistance of the vessel, but on approaching the shore was hailed by some armed *Spaniards*, who ordered him not to attempt going on board, as the vessel was placed under their custody, by the supreme junta of health, who had directed that no communication whatever should be allowed with her, but that the pieces should be burnt as they might break from her, it being suspected that she was infected with the plague, having drifted on shore on the 5th of *September* without a living creature on board. Captain *Shaw* and the master of the *Philomel*, notwithstanding the menaces of the *Spaniards*, succeeded, although at considerable risk, owing to the state of the weather, in getting on the deck of the vessel, and found in the cabouse some torn sheets of an *English* log, by which it appeared that she was the *Elliotta* from *London* bound to *Minorca*, and also one sheet of a *French* log for the 10th of *August* 1813, by which they learnt that she had on that day been captured, off *Alicant*, by a *French* privateer. Captain *Shaw* then returned on

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ELLIOTTA.

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1815.

on board the *Philomel*, and caused her to be anchored as near the *Elliotta* as possible, and sent his boats, with a number of officers and men, to clear the *Elliotta*, and to save whatever they could: he also prevailed with the *Spanish* officer of health to allot a small space of ground, on the beach for the reception of the cargo, which he carried on shore in his boats, through a heavy and dangerous surf, and then placed guards over it for its security. He afterwards, by great exertion, got the vessel afloat, fitted her with stores from his own sloop, and began to reship the cargo, when he received an express from the captain general of the marine at *Carthagera*, ordering him to desist, and to forward to him all the papers and documents to enable a *Spanish* court of admiralty to decide on the national character of the vessel. Captain *Shaw*, through the means of the *British* consul, made a strong representation of the dangerous state in which the ship was lying, and obtained permission to reship the cargo, but upon condition that he should bring it to *Carthagera*, which he accordingly did. When *there*, he succeeded in proving to the satisfaction of the *Spanish* authorities that the property was *British*, and prevailed upon them to place it at his disposal. Having thus got full possession of the property, he proceeded with it to *Alicant*, and delivered it up to the agent for *Lloyd's* resident at that port, by whom it was afterwards sold for the benefit of the insurers. The value of the property saved was £2,200.

#### JUDGMENT.

Sir *William Scott*.—I think the facts of this case contain every degree of merit that can possibly arise

The  
ELLIOTTA.June 13th,  
1815.

arise in a salvage service. Here was great danger from the state of the weather, and the situation, in which the ship was placed,—here was an armed force on the beach, ready to oppose the measures which it was necessary to pursue for the preservation of the property, and here was another danger of an extraordinary nature, the fear of a pestilential disorder, on account of which it was supposed the vessel and cargo had been abandoned. It is impossible that more good conduct can have been displayed in any case than Captain *Shaw* and his men have exhibited throughout this transaction. They directed their attention and labours in the best possible manner to preserve the property from the violence of the elements,—took great care of it afterwards; and finally, with great prudence and discretion, handed it over to the person most proper to have the custody and management of it. This is not, it is true, precisely a case of derelict, but it is as nearly so as possible, and I think I am bound to give quite as large a remuneration as I should have done if it had been a case of derelict. I shall give the salvors a moiety of the property.

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## HARMONY, NORMAN.

July 31st,  
1815.

The Prize Court of Admiralty has jurisdiction over cases of seizure as prize, although the same may have been effected after the time prescribed for the cessation of hostilities by a treaty of peace.

**T**HIS was the case of a *British* ship with a *British* cargo, which, in the prosecution of a voyage from *Oporto* to *London*, was captured off *Cape Finisterre*, on the 2d of *March* last by the *American* privateer *James Munroe*, under the command of *David Williams*, who took out the master and the rest of the crew, except *John Nelson* the mate, and sent an *American* prize master and one other *American* and five *Frenchmen* on board, with directions to take the vessel to some port in the *United States of America*. On the 24th of the same month, *Nelson* the mate, having previously ascertained that the *Frenchmen* would not oppose him, cut down the prize master with a hatchet and threw him overboard, leaving the other *American* to suppose that he had accidentally fallen into the sea. *Nelson* then brought the ship and cargo to *England*, and on the 13th of *April* they were arrested at his suit in a cause of salvage, by reason of recapture from the enemy. A claim was given for the ship as the property of *William Williamson* and *George Norman*, respectively *British* subjects, and for the cargo as belonging to Messrs. *Sanderson* and *Lynch* of *London*. On the 6th of *May* the Court decreed restitution to the claimants on the payment of the sum of £1,390 to the salvor, being the tenth part of the value of the ship and cargo.

On the 26th of *May* a claim was given in on behalf of *David Williams*, the commander of the *American*



*American* privateer, alleging that the vessel had been taken as prize by him on the 2d of March last, in latitude 42° north, and longitude 12° west, within the period prescribed for captures by the late Treaty \* of Peace between *Great Britain* and the United States of *America*, and had been retaken on the 24th of the same month, in latitude 42. 47. north, and longitude 23° 13' west, after the period specified in the said treaty for the termination of captures in that latitude and longitude. It was also alleged on behalf of the *American* captor, that no proceedings had been instituted by the re-captor to bring the ship and cargo to adjudication as prize. A monition was decreed against *John Nelson* in special, and all others in general, to proceed to the adjudication of the ship and cargo, and the ship itself was arrested. Monitions were also served on the owners of the ship and cargo, on the proctor for *John Nelson*, (he being absent from the country), and in the usual manner on the pillars of the *Royal Exchange*. The tenor of the monitions was to call upon the parties to shew cause why the *Harmony* should not be decreed to be released from the recapture, as having been effected after the time specified in the Treaty of Peace for the termination of hostilities, and why the same should not be delivered up to the claimant on behalf of the *American* captor.

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An appearance was given under protest for the *British* owners; and it was submitted on their behalf, that the Court had no authority to take cognizance of the cause, and could not try the question as to the recapture of the ship and cargo

\* For the clause of the Treaty, vide p. 57.

from

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from the *American* prize master ; the same having been effected after the period fixed by the Treaty of Peace for the cessation of hostilities between *Great Britain* and *America*, and when *Great Britain* was at peace with all the world ; that the Prize Court of Admiralty has no jurisdiction to take cognizance of any seizures made upon the high seas during a time of profound peace, but that its authority is limited to the entertaining questions of prize arising out of captures or recaptures made by *British* subjects during the continuance of hostilities ;—that no *American* could maintain a suit or action, in any *British* court of justice, whilst war subsisted between the two countries ; and after the conclusion of peace, by which alone an *American* could obtain a *persona standi* in a *British* court, no question of prize of war between *Great Britain* and *America* could arise, any seizure by the subjects of either nation after the conclusion of peace, and the time limited in the treaty of peace for making captures, not being in the nature of prize, nor cognizable as such in a court of admiralty having prize jurisdiction. It was likewise submitted, that whatever authority the court might have possessed, had been exercised by the decree granting restitution of the ship and cargo to the *British* claimants, on payment of salvage to the recaptor, which decree was binding upon all parties, and that the judge had no power to alter or reverse it ; but, that if any persons felt themselves aggrieved or injured by the decree, they might resort for redress to the High Court of Appeals in Prize Causes, and to no other court whatever.

Appli-

Application was also made on behalf of the *British* owners to the Court of Chancery,\* by petition, praying that a writ of prohibition returnable in the Court of King's Bench might issue, directed to the Right Honourable the Judge of the Admiralty Prize Court, to prohibit him from further proceeding or holding plea before him, in any manner, touching or concerning the premises. On the 26th of *July* the Vice Chancellor, before whom the petition was heard, by direction of the Lord Chancellor, intimated it to be his opinion that the prohibition ought not to be granted, and two days afterwards said he had seen no reason to change the opinion he had before expressed, and the petition was accordingly dismissed. A written communication to this effect was on the same day made by the deputy registrar of the court to the deputy registrar of the admiralty court.

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HARMONY.

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When the case was again brought before the Court, the Judge observed that it was proper the communication received from the Court of Chancery should be recorded, and it was accordingly entered in the registrar's book.

The Judge said, I shall certainly overrule this protest, as I do not now, nor ever did, entertain the slightest doubt of the power of the Court to entertain the question. And as to the decree of restitution upon salvage, which was before made by the Court, that I think ought to have no effect. So far as the *American* captor is concerned, it was altogether *res inter alios acta*, and therefore cannot

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\* Vide 1st *Maddock*, p. 15. ex parte *Lynch* and another.

The  
HARMONY.

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1815.

be binding upon him. The Judge then proceeded to pronounce the former decree, by which the ship and cargo had been restored on payment of salvage, to be of no force and validity, and by his final interlocutory decree ordered the ship and cargo to be released from the recapture thereof, and to be delivered up to the claimant, on behalf of *David Williams*, commander of the *American* private ship of war *James Monroe*.

## WOODROP-SIMS, JONES.

(Instance Court.)

**THIS** was a cause of damage at the instance of *Thomas Potts* and *George Taylor*, the owners of the brig *Industry*, against the above ship the *Woodrop-Sims*, her tackle, &c.

November 21st,  
1815.

Rules for fixing  
or apportioning  
the loss occa-  
sioned by two  
vessels running  
foul of each  
other.

On the part of the complainants it was stated, that the *Industry*, being a brig of the burthen of eighty-nine tons, sailed on the 12th of *May* from *Sunderland* with a cargo of coals for some port in the west of *England*, and that about two o'clock in the morning of the 19th of *May*, being off the South Foreland which bore west-south-west, distant about a mile and a half, with the wind about west-north-west, and steering a south-west course close by the wind, and on the starboard tack, the *Woodrop-Sims* was observed about three hundred yards distant running to the north-east with a free wind. That the master and crew of the brig perceiving that the ship continued her course, and that if it was not altered she would come direct upon them; called out several times as loud as possible, but no notice was taken of their hailing, and the *Woodrop-Sims* came on board the brig and stove in her larboard-side, and she sunk almost immediately, the crew of the brig having just time to save themselves on board the *Woodrop-Sims*. That the loss of the *Industry* and her cargo was

G 2                      occasioned

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SIMS.

November 21st,  
1815.

occasioned by the negligence or want of skill of the master and crew of the *Woodrop-Sims*, and by the want of a good look-out on board that ship.

On the other side it was stated, that the *Woodrop-Sims*, being an *American* vessel of the burthen of five hundred and twenty tons, sailed from *Philadelphia* in *April* 1815, bound for *London*; that on the 18th of *May* she arrived in the *English* channel and took a pilot on board, and at about three o'clock A.M. of the following day, when sailing into the *Downs* with the wind at north-west, blowing a moderate breeze, and steering north-east by north, the pilot and the men composing the starboard watch, discovered a brig on the lee bow coming directly towards them; that the pilot, who was standing on the poop, ordered the helm to be put hard to starboard, in order to clear the brig, which was accordingly done; that the pilot then ran forward to the forecastle of the ship, and hailed the brig to put her helm hard to starboard; that the brig did not do so, but put it hard to port, whereby she was immediately brought under the bows of the *Woodrop-Sims*, and in about fifteen minutes afterwards sunk; that the loss of the brig was not occasioned by any improper conduct or want of skill of those on board the *Woodrop-Sims*, but by the negligence of the master and crew of the *Industry*, and by the want of a good look-out on board that brig.

The Court was assisted by two of the elder brethren of the *Trinity House*.

JUDG-

## JUDGMENT.

The  
WOODROP-  
SIMS.

November 21st,  
1815.

Sir *William Scott*.—This is one of those unfortunate cases in which the entire loss of a ship and cargo has been occasioned by two vessels running foul of each other.

There are four possibilities under which an accident of this sort may occur. In the first place, it may happen without blame being imputable to either party; as where the loss is occasioned by a storm, or any other *vis major*: In that case, the misfortune must be borne by the party, on whom it happens to light; the other not being responsible to him in any degree.—Secondly, a misfortune of this kind may arise where both parties are to blame; where there has been a want of due diligence or of skill on both sides: In such a case, the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them.—Thirdly, it may happen by the misconduct of the suffering party only; and then the rule is, that the sufferer must bear his own burthen.—Lastly, it may have been the fault of the ship which ran the other down; and in this case the injured party would be entitled to an entire compensation from the other.

It frequently happens in cases of this kind, that there is great discordance of evidence as to the facts upon which the Court has to form its decision. The testimony of the witnesses is apt to be discoloured by their feelings, and the interest which they take in the success of the cause; and the Court too frequently has to decide upon great diversities of statement as to the courses the

The  
WOODROF-  
SIMS.

November 21st,  
1815.

vessels were steering, or the quarter from which the wind was blowing at the time when the accident occurred. In the present case, I am in a great measure relieved from all difficulties of this kind, and it is not at all necessary for me to pay any minute attention to the conflicting testimony of the witnesses respecting the wind; for, I understand it to be the opinion of the gentlemen (the *Trinity* masters) by whom I have the good fortune to be assisted on this occasion, that the state of the wind, as deposed to on one side and on the other, does not differ so materially as to make any difference in the measures which ought to have been pursued for the avoidance of this unfortunate accident. I am also relieved from any very minute attention to the testimony of the witnesses respecting the look-out which was kept either in one ship or the other; because, however different the representation in this respect may be, there was, at all events, abundance of time after the discovery of each other to have taken precautionary measures for avoiding the accident. The misfortune which occurred must not be attributed, therefore, to what took place before the vessels perceived each other; but was consequential upon what occurred afterwards.

This state of circumstances raises a question or two of professional skill, upon which you, gentlemen, (addressing himself to the *Trinity* masters), will have to decide. It is incumbent on you to determine whether proper measures of precaution were taken by the vessel which unfortunately ran the other down. The law imposes upon the vessel having the wind free, the obligation of taking proper measures to  
get



get out of the way of a vessel that is close-hauled, and of shewing that it has done so, if not, the owners of it are responsible for the loss, which ensues. This, therefore, is the first point upon which the Court request to be favoured with your opinion. If you shall think that the proper precautions were taken by the persons on board the *Woodrop-Sims*, then it will become necessary to enquire whether these measures were counteracted and defeated by improper measures taken by those on board the other ship. Upon these points, gentlemen, I shall rely on your judgment.

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SIMS.

November 21st,  
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The *Trinity* masters expressed their opinion, that the *Woodrop-Sims* was to blame; that she had the wind free, and ought to have got out of the way.

The Court pronounced its sentence accordingly, and referred the settlement of the amount of loss to the registrar and merchants.

## GENOA and SAVONA.

November 27th,  
1815.

A ship of war  
being *in itinere*,  
and barely seeing  
or hearing a  
firing on the  
land, is not en-  
titled to share in  
the beneficial ef-  
fects of an attack  
made by a force  
with which she  
has no concert  
or communi-  
cation.

THE towns of *Genoa* and *Savona* were taken in the month of *April* 1814 by His Majesty's sea and land forces under the command of Lord *William Bentick* and Sir *Edward Pellew*, and the shipping, ordnance, &c. &c. there seized have since been condemned in the Court of Admiralty, the whole property being subject to His Majesty's direction for distribution amongst the captors. A suggestion having been made by the agents of the actual captors that His Majesty's ship *Pompée* would not be allowed to participate in the benefit arising from the capture, a memorial was presented by Sir *James Athol Wood*, the commander of that vessel, to His Majesty in Council, praying that the *Pompée* might be included in the list of the vessels entitled to share, or if doubts were entertained of her claim, that leave might be given for the usual measures to be taken in the Court of Admiralty to establish her right. The Lords of the Treasury signified their pleasure to the King's Proctor that Sir *James Athol Wood* might be at liberty to prefer the claim, and the King's Proctor, on behalf of His Majesty, consented accordingly. An allegation was now offered setting forth the interest of the *Pompée*.

## JUDGMENT.

Sir *William Scott*.—This case is brought here by a reference from His Majesty's government, and now comes before the Court on the admission

of an allegation setting up a claim of joint-capture on behalf of His Majesty's ship *Pompée*. The first article is introductory to the others, and contains a sort of historical account of the transaction, without which the remaining parts of the allegation would be scarcely intelligible. Therefore, if the remaining articles are proper to be admitted, I think this article must also be deemed admissible.

GENOA  
and  
SAVONA.

November 27th,  
1815.

The history it narrates is this: "That in the  
" early part of the year 1814, Lord *William*  
" *Bentick* and Sir *Edward Pellew* Bart. (now  
" Lord *Earmouth*) the commanders in chief of His  
" Majesty's military and naval forces in the  
" *Mediterranean Sea*, projected an expedition to  
" the coast of *Italy*, to be more especially directed  
" against *Genoa* and other towns of the *Genoese*  
" territory; and the necessary arrangements for  
" the same having been made, a body of *British*,  
" and foreign troops in the *British* service, pro-  
" ceeded from the island of *Sicily* to *Leghorn*,  
" where they effected a disembarkation in the  
" latter end of the month of *March* of the same  
" year, and immediately advanced towards the  
" *Genoese* territory, the said troops being under  
" the immediate command of the said Lord *Wil-*  
" *liam Bentick*, and being aided and assisted on  
" the coast by a squadron of His Majesty's ships  
" of war, under the orders of Sir *Josias Rowley*  
" Bart. commander of His Majesty's ship the  
" *America*." In the second article it is pleaded,  
" that previous to the sailing of the said troops  
" from *Sicily*, the said Lord *William Bentick* being  
" desirous of obtaining an accession of force to  
" that

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“ that which he could take from thence, made  
 “ application to General *Clinton*, commander of  
 “ His Majesty’s forces in *Catalonia*, to send him  
 “ all the troops he could spare, and having com-  
 “ municated the same to the said Sir *Edward*  
 “ *Pellevé*, on or about the 26th of *March* dis-  
 “ patched His Majesty’s ship *Pompée*, Sir *James*  
 “ *Athol Wood* commander, with some empty  
 “ transports and victuals, from *Mahon* in the  
 “ island of *Minorca* to *Tarragona*, for the purpose  
 “ of their conveyance, and with instructions to  
 “ the said Sir *James Athol Wood* to place himself  
 “ under the orders of Rear-Admiral *Hallowell*,  
 “ commanding His Majesty’s ships at that place.”  
 And the third article goes on to plead “ that His  
 “ Majesty’s ship *Pompée*, with the transports and  
 “ victuallers, accordingly proceeded for *Tarragona*,  
 “ and upon their arrival there a division of troops  
 “ to the amount of 1,500, then under the com-  
 “ mand of Major General Count *Lataur*, were  
 “ embarked on board thereof, and with which  
 “ they sailed from *Tarragona* on or about the  
 “ 9th day of *April*, the said Sir *James Athol Wood*  
 “ being directed by an order from the said Rear-  
 “ Admiral *Hallowell* to proceed to *Leghorn* and  
 “ consult with Lord *William Bentick* respecting  
 “ the disembarkation of the said troops.” Now  
 from this statement it does not at all appear that the  
*Pompée* was to compose part of the force destined  
 to act either generally against the coasts of *Italy*,  
 or particularly against this town of *Genoa* and its  
 dependencies. The allegation proceeds to state  
 that “ on the 17th of the said month of *April* His  
 “ Majesty’s said ship *Pompée* and transports  
 “ arrived

“ arrived within sight of *Genoa*, and in the after-  
 “ noon of that day a firing was there distinctly  
 “ seen and heard from on board the *Pompée*; that  
 “ such firing was an attack which had been made  
 “ on *Genoa* by the aforesaid troops under the  
 “ command of Lord *William Bentick*, which had  
 “ advanced against it from *Leghorn*, and the  
 “ aforesaid squadron under the orders of Sir *Josias*  
 “ *Rowley*, reinforced by the arrival of His Ma-  
 “ jesty’s ship *Caledonia* with Sir *Edward Pellew*  
 “ on board.” On this statement it appears that  
 the *Pompée* had very little connection and no  
 direct communication with the fleet which was  
 engaged in the attack. The business of Sir *James*  
*Athol* was to proceed to *Leghorn*, and consult  
 with Lord *William Bentick* respecting the disem-  
 barkation of the troops on board the *Pompée*. He  
 did not and could not at all know that Lord *William*  
*Bentick* was in the neighbourhood of *Genoa*. It  
 was at *Leghorn*, and not at *Genoa*, that he was  
 going to seek him, for it was there that he expected  
 to find him. It is impossible that he should have gone  
 on to *Leghorn* in search of Lord *William Bentick*, if  
 he had suspected that his lordship and Sir *Edward*  
*Pellew* were in person directing the attack against  
*Genoa*: Sir *James Athol* could not have known  
 that the firing which he heard proceeded from  
 their forces, or he never would have gone on to  
*Leghorn*. The article goes on to plead, that “ on  
 “ the following day, a summons for the surrender  
 “ of the said town was sent to the commandant  
 “ by the said Lord *William Bentick* and Sir  
 “ *Edward Pellew*; and, after some negotiation,  
 “ terms of capitulation were agreed to; and that at  
 “ the

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“ the time of sending the said summons, and of  
 “ the terms of capitulation being agreed to, His  
 “ Majesty’s said ship *Pompée* and transports were  
 “ in sight of and seen by the enemy at *Genoa* ;  
 “ and in such summons the said Lord *William*  
 “ *Bentick* and Sir *Edward Pellew* represented  
 “ their expectation of being momentarily joined  
 “ by a great augmentation of force, thereby  
 “ meaning the said ship *Pompée* and transports,  
 “ with the troops embarked therein ; and that by  
 “ reason thereof, and of the circumstances before  
 “ pleaded, His Majesty’s said ship *Pompée* was  
 “ acting in concert with and afforded encourage-  
 “ ment to the said Lord *William Bentick* and  
 “ Sir *Edward Pellew*, and the troops under their  
 “ command, and created intimidation to the  
 “ enemy, and accelerated the surrender of the  
 “ said town.” Why as to the summons of sur-  
 render, and the capitulation which followed, Sir  
*James Athol* knew just nothing. Had he known  
 that these commanders were engaged in this suc-  
 cessful operation, he never would pursued as he  
 did his destination, without communicating with  
 them : and as to the acting in concert with and  
 affording encouragement to Lord *William Bentick*  
 and Sir *Edward Pellew*, and their troops, it does  
 not appear from the statement that *They* knew of  
 the *Pompée*’s presence, or that the *Pompée* was at  
 all cognizant of *Theirs*.

The question then comes to this, whether a ship  
 of war being *in itinere*, but barely seeing or hearing  
 a firing on the coast which she is passing in the pro-  
 secution of her voyage, without at all knowing the  
 occasion of such firing, is entitled to share in the  
 beneficial effects of an attack made by a force with  
 which

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which she has no communication or concert whatever: to say that she would be so entitled, appears to me to be going farther than has hitherto been done in any case with which I am acquainted. If the *Pompée* and the actual captors had recognized each other, the case perhaps might have been different; but here was a perfect ignorance on both sides. The *Pompée* had no communication with the captors, nor knowledge of what the force was that was employed in the operation, nor of the precise object of attack. The allegation goes on to plead, that “the *Pompée*”  
 “and transports pursued their course for *Leghorn*,  
 “agreeably to the order of the said Admiral *Hallowell*, and arrived there in the evening of the  
 “19th of *April*; that he the said Sir *James Athol Wood*, finding that no orders had been left for  
 “him by the said Lord *William Bentick*, deter-  
 “mined to proceed with the *Pompée* and trans-  
 “ports for *Genoa*; and, on the following morning,  
 “they sailed accordingly, and arrived off the  
 “same, early in the morning of the 21st; but  
 “owing to light and contrary winds, did not come  
 “to anchor off the mole, until the morning of  
 “the 22d, when the troops were landed; and  
 “when it was learnt that the town had surrendered  
 “by capitulation, and that the colors had been  
 “hauled down on the preceding day, pursuant to  
 “the terms of the same, and whilst the said ship  
 “*Pompée* and transports were in sight.” From this surely they can derive no title to share, if the former facts did not give it them.

With respect to the claim to share for the capture of *Savona*, that, I think, does stand upon a better

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better foundation There the *Pompée* had been recognised, and had received orders: Her commander knew that Lord *William Bentick* and Sir *Edward Pellew* were directing and superintending the attack. The allegation pleads, “that in the  
“afternoon of the said 22d of *April*, a detach-  
“ment of troops were embarked in His Majesty’s  
“ships *Armada* and *Curaçoa*; and proceeded as  
“a small expedition, by the directions of Lord  
“*William Bentick* and Sir *Edward Pellew*, from  
“*Genoa* against the town of *Savona*, situated on  
“the coast, and distant about        miles from  
“thence; and on the 24th of the said month, the  
“same surrendered to it by capitulation after a  
“slight resistance; that during such time His  
“Majesty’s ship *Pompée* having remained at anchor  
“off the mole, the persons on board thereof  
“never lost sight of the *Armada* or *Curaçoa*,  
“except during the night; and the *Pompée* could  
“also, during the same period with the same  
“exception, be plainly seen by the persons on  
“board the *Armada* and *Curaçoa*;—that the firing  
“or attack upon the said town, which preceded  
“the surrender on the said 24th of *April*, was  
“plainly seen from on board the *Pompée*, and that  
“she communicated information of the same, by  
“signals, to His Majesty’s ship *Caledonia*, bearing  
“the flag of Sir *Edward Pellew*, and lying within  
“the harbour of *Genoa*.” Here then the *Pompée*  
had a certain knowledge of the attack, and the  
object of it; and no intention, as in the other  
case, of quitting the scene of action and proceeding  
on a voyage elsewhere: She was placed likewise  
under



under the orders of the same superior officer, who commanded the naval force by which the attack was actually made ; and she was herself not altogether inactive in the business, for she communicated information by signal to the commander in chief: These facts, if proved, would, I think, be sufficient to establish the claim of the *Pompée* to share for the capture of *Savona*, but not of *Genoa*. The allegation must therefore be reformed accordingly.

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## LA HENRIETTE.

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When a prize is taken coming out of a blockaded port, by one of the blockading squadron stationed off the mouth of the harbour, the other ships of the squadron, although stationed at some distance, are entitled to share.

**T**HIS was the case of a *French* ship which was captured in the night of the 14th of *August* 1814, in the *Passage du Raz*, by His Majesty's ship *Clarence*, under the command of Captain *Henry Vansittart*. A claim of joint capture was made on behalf of the commanders, officers, and crews of His Majesty's ships *Queen Charlotte*, *Pyramus*, *Nimrod*, *Rippen*, and *Ville de Paris*; and an allegation was brought in pleading the facts upon which their claim to share in the proceeds of the prize was founded. The allegation pleaded "that  
 " in the month of *January* 1814, His Majesty's  
 " ships of war *Clarence*, *Henry Vansittart* Esq.  
 " commander, *Queen Charlotte*, *Robert Jackson*  
 " Esq. commander, *Pyramus*, *J. L. Dean Dundas*,  
 " commander, *Rippen*, *Sir Christopher Cole Knight*,  
 " commander, *Ville de Paris*, *Charles Jones* Esq.  
 " commander, and hired armed cutter *Nimrod*,  
 " Lieutenant *Thomas Peake* commander, were em-  
 " ployed as a squadron, under the command of Rear-  
 " Admiral *Sir Harry Neale*, to blockade the port of  
 " *Brest*, in which there was at that time a *French*  
 " fleet, at least equal in point of number to the said  
 " squadron; that during the time the said squadron  
 " was employed in blockading the port of *Brest*,  
 " some one vessel of the said squadron usually re-  
 " mained close off the entrance of the harbour of  
 " *Brest*, whilst the remainder of the said squadron  
 " remained at anchor in *Douarne Nez Bay*, near the  
 " said

" said port of *Brest*; that on or about the 5th  
 " *January* 1814, *Henry Vansittart* Esq. comman-  
 " der of His Majesty's ship of war *Clarence*, one of  
 " the said squadron, was ordered by the said Rear-  
 " Admiral Sir *Harry Neale*, to proceed from  
 " *Douarne Nez Bay*, where the said squadron was  
 " then at anchor, to watch the entrance of the  
 " harbour of *Brest*; that the said *Henry Vansittart*  
 " Esq., agreeably to such orders, proceeded, with  
 " His Majesty's ship of war *Clarence* under his  
 " command, from *Douarne Nez Bay* off the harbour  
 " of *Brest*, and continued there during the night  
 " between the 5th and 6th of the said month of  
 " *January*; and in the course of the said night  
 " captured the *French* national ship or vessel  
 " *Henriette*, proceeded against in this cause,  
 " which was then attempting to escape from the  
 " said port of *Brest*, and in the morning of the  
 " said 6th of *January* returned with the said ship  
 " or vessel *Henriette* to *Douarne Nez Bay*, where  
 " the *Clarence* and *Henriette* came to an anchor  
 " with the rest of the squadron; that when the  
 " *Henriette* was so captured by the *Clarence*, the  
 " *Clarence* was employed, together with His Ma-  
 " jesty's ships *Queen Charlotte*, *Pyramus*, *Rippen*,  
 " *Ville de Paris*, and hired armed cutter *Nimrod*,  
 " under the command of the said Rear-Admiral,  
 " in blockading the said port of *Brest*, and in  
 " endeavouring to capture any vessels which  
 " might attempt to enter into or sail therefrom; and  
 " His Majesty's said ships *Queen Charlotte*, *Pyra-*  
 " *mus*, *Rippen*, *Ville de Paris*, and hired armed  
 " cutter *Nimrod*, were actually aiding and assisting  
 " His Majesty's said ship *Clarence* in capturing the  
 " *Henriette*,

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“ *Henriette*, by intimidating a number of *French*  
“ ships of war which were then in the port of  
“ *Brest*, and preventing them coming to the  
“ assistance of the *Henriette*.”

The admission of this allegation was opposed on behalf of the actual captor.

#### JUDGMENT.

Sir *William Scott*.—This is a claim of joint capture on the ground of associated service, the object of the particular association being the blockade of the harbour of *Brest*; the Court has always held that a service of this kind associates vessels as intimately as it is possible for any service to do, since, from the very nature of it, it can only be performed by a combination of vessels. It is, I apprehend, a common practice to station one vessel close off the mouth of the harbour, whilst the remaining part of the squadron keeps at some distance, but still near enough to render assistance if necessary. The mode, therefore, which was adopted in this particular instance for effecting the purpose, cannot be considered as an unusual one, nor does it appear that this station, close to the mouth of the harbour, was always assigned to this individual ship, the *Clarence*, but that the several vessels under the command of Sir *Harry Neale* took it by turns to watch the entrance of the harbour. It has been said, that the bay in which the squadron remained was not near *Brest*, and that the squadron, therefore, could not have come up in time to render assistance; but I am at present to take the facts as described in the allegation, and I find it there stated, that the squadron remained at anchor  
in

in *Douarne Nez Bay*, near the port of *Brest*. If the fact be otherwise, it may be counterpleaded, but, at present, I must consider it as truly stated. The squadron itself, although at some distance, must still be considered as maintaining the blockade; it was impossible, indeed, that the *Clarence* could have maintained it without their assistance, for there was at that time a *French* fleet in the harbour of *Brest* at least equal in point of number to the *British* squadron. I think that the other ships of the squadron were as much connected with the service of the blockade of *Brest*, and as necessary to the due performance of it, as the *Clarence* herself was, and that, upon due proof of the facts now pleaded, they would be equally entitled to share in the proceeds of this prize which was taken coming out of the harbour of *Brest*. I shall therefore admit the allegation.

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*Note.*—When this case came on for hearing upon the evidence, the Court rejected the claim for want of due proof of the facts pleaded in the allegation. It turned out that the prize in question did not come out of *Brest*, but was a small unarmed coasting vessel, bound at the time of capture from *Legue* to the port of *Croisi*, and had taken shelter in *Cannonet Bay* to watch the opportunity of running through the *Passage du Raz* in the night.

## LORD HOBART, GAMAGE.

(Instance Court.)

December 7th,  
1815.

A post office  
packet may be  
arrested in a suit  
for mariner's  
wages.

THIS was a cause of subtraction of wages instituted by *John Gundry*, chief mate, and *George Borlase*, late surgeon of this vessel, which was a packet in the service of His Majesty's Post Office, but belonging to private individuals. An action was entered against the ship, and a warrant of arrest extracted, when the owners gave bail to answer the action, and a supersedeas issued. A summary petition on behalf of the mate and of the surgeon was brought in, the admission of which was opposed. The petition stated in substance, that on the 11th of *May* 1814, the *Lord Hobart* packet being at *Falmouth*, and employed in the service of the general post office, in the conveyance of mails to the *Leeward Islands* and back, captain *William Dick Gamage*, the commander, hired *John Gundry* as master or chief mate, and *George Borlase* as surgeon, and agreed to pay each of them five pounds *per* month for their respective services, so long as they should continue in *his* service on board the ship, and a further sum of eight pounds *per annum* to Mr. *Borlase* for medicines for the use of the ship's company, being the sum usually paid to surgeons of such vessels on that account; that they sailed to the *Leeward Islands* and back with the mail and govern-

government dispatches, and continued in the service of the packet until the 23d and 24th of *December*, when they were respectively discharged. The petition further alleged, that, by the custom of the service, Mr. *Borlase*, as surgeon of the ship, was entitled to receive extra wages from the general post office, at the rate of three pounds *per* month; and that the same had been paid to him. On the part of the owners, an affidavit was offered, setting forth the nature of the contract between the Postmaster General, and the owners of the packets employed by them; and also the manner in which the crews were usually hired by the Commanders of the packets; but the Court refused to receive, on the mere affidavit of the party, that which might be a bar to the action, and therefore rejected the affidavit.

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Against the admission of the petition, *Lushington* argued, that a post office packet ought not to be arrested at the suit of mariners for their wages, as great inconvenience must arise from the detention of vessels engaged in a public service of this description; that the contract and hiring was not pleaded to have been made in the usual manner by *the owners themselves, or the master on their account*, but by the *master only*, without any reference to the authority of *the owners*, or any averment that the men entered into *their* service; that *Gundry* was hired as *master or chief mate*, and that a *master* contracts personally with the owners, trusting altogether to their credit, and therefore could not sue in the Court of Admiralty, but must bring his action in the common law courts on the contract; that a surgeon could not be considered

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as a *mariner*, and therefore was not entitled to sue for his wages in the Court of Admiralty; that the right of a carpenter to sue in an admiralty court had indeed been admitted, but, beyond this, the jurisdiction of the Court had never been carried; that the claim of an allowance for medicines and for other advantages rested on the special custom of the service, over which the Court possessed no jurisdiction. *Clay v. Snelgrave*, Salk. 33. 1 Lord Raym. 576. Carth. 518. 12 Mod. 405.—*Smith v. Plummer*, 1 Barn. & Ald. 571.—*Ragg v. King*, 1 Barnard, 297. 2 Strange, 858.—*The Favourite*, 2 Robinson, 232.—*Allison v. March*, 2 Ventris, 181. Anon. 8. Mod. 379.—*Bins v. Parre*, 2 Lord Raym. 1206.—*Wheeler v. Thompson*, Strange, 707.—*Bayley v. Grant*, 1 Lord Raym. 632.—*Opy v. Child*, Salk. 31. *Dry v. Sirle*, 2 Strange, 968. 2 Barnard, 419.—*Howe v. Napier*, 4 Burr. 1944.

Adams *contra* contended, that there was no danger that the inconvenience which had been suggested would arise from the arrest of the ship, as bail had been given to answer the action, and a supersedeas immediately issued; that it was sufficient that the hiring was by the master, without stating that he acted in the capacity of agent for the owners: If there was nothing in the plea to show that he did not act on their behalf, the Court would presume that he did. With respect to the surgeon's claim, it must be supposed that he looked to the security of the ship, precisely as the mariners themselves do for their wages. His right to sue in the Admiralty for his wages must, at all events, be as well founded as that of the ship's carpenter, which had been admitted.

JUDG-



## JUDGMENT.

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Sir *William Scott*.—In disposing of this case I must consider the objections as they arise on the petition itself, without paying any attention to the statement contained in the affidavit of the owner, which I cannot allow to be used for any other purpose than to account for the non-production of the ship's articles. The first objection which has been taken is certainly not immaterial, namely, that the vessel was employed as a packet in the service of the general post office, and I certainly think that a proceeding of this sort should not be resorted to without giving due notice to the officers of that establishment.

(The deputy registrar here stated that notice had been given in other cases of the same kind, and that the reply was that no objection existed on the part of the post office to the exercise of the jurisdiction.)

*Judgment resumed.*—That I think disposes altogether of the objection, and leaves me at liberty to decide upon this question precisely in the same way as I should in the case of any other ship. I could not but be alarmed at the danger which I apprehended might have arisen to the public service from the detention of vessels of this kind, but the information which I have now received relieves me from the difficulty which I should otherwise have felt.

The petition pleads, that *Gamage*, the commander, hired *John Gundry* as master or chief mate, and *George Borlase* as surgeon, at the rate of £5 per month. Now, as far as *Gundry* is concerned, I can see no sufficient objection to this part of the

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ship's surgeon  
cannot sue for  
wages in the  
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petition. It is true, that it would have been more correct to have described him as *chief mate only*, and not *as master or chief mate*, because as *master* he would not be entitled to sue in this Court for his wages; but the circumstance of *Gamage* himself being described as *commander of the vessel* makes it quite clear that this man is to be considered in the capacity of *mate*. I can therefore see no sufficient objection to the petition so far as the chief mate is concerned. If the facts are incorrectly stated, they may be counterpleaded.

With respect to the surgeon's claim, *that* I think stands upon a much more doubtful foundation. I am not myself aware of any case in which a surgeon has been permitted to sue for wages in the Admiralty Court, nor have the counsel been able to bring any such case to my notice. The absence of all cases of this kind is certainly a strong circumstance to shew that the court possesses no such jurisdiction. A carpenter, it is said, has been permitted to sue in the Admiralty for his wages, and it has been asked why the same privilege should not be extended to a surgeon; but it must be recollected that a ship's carpenter frequently acts in the capacity of a mariner also, which I presume a surgeon is not expected to do. The claim, therefore, of the surgeon, does not rest on the same foundation as that of the carpenter who is also regarded in the light of a mariner; and this distinction may possibly, take the claim on the part of the surgeon out of the limits of the jurisdiction assigned to this Court by the courts of common law. Besides, the contract of this gentleman is, in other respects, very different to the common contract of mariners for their wages. The engagement

ment which he has entered into is of a *mixed nature*, being made partly with His Majesty's post office and partly with the owners of the vessel. This alone, converts it into a special contract, upon which this Court is not permitted to adjudicate. A part of the claim, too, is for medicines furnished by this gentleman for the use of the ship's crew. This he certainly cannot recover in a court constituted as this is. I am therefore not disposed, as at present advised, to admit this part of the allegation; but if upon search being made, any case can be found, in which a surgeon has been permitted to sue in the Court of Admiralty, I will permit the suit for the monthly wages to go on, if not, I must dismiss the allegation so far as it relates to the claim of the surgeon.

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*Note.*—No farther proceedings were had in this cause; and consequently the Court came to no decision upon the question of the right of a surgeon to sue for his wages in the Court of Admiralty. If the cause had been persevered in, it is not improbable that the Court would have permitted the surgeon to sue under the authority of the case of *Mills v. Long*, reported in *Sayer*, p. 136. In that case, the Court of King's Bench unanimously decided that a surgeon of a ship may sue in the Admiralty for his wages. One of the Judges (*Foster*) at first doubted, but afterwards concurred in opinion with the rest of the justices.

## L'ETOILE, PHILIBERT.

March 8th,  
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If two vessels are associated for the purpose of effecting a capture, the continuance of the chase is sufficient to give the right of joint capture, and sight is under such circumstances unnecessary.

THIS was a claim on behalf of Captain *Lock*, the commander, and the other officers and crew of His Majesty's sloop *Sparrow*, to share in the proceeds of a prize taken by His Majesty's Frigate *Hebrus*, under the circumstances stated in the judgment of the Court.

## JUDGMENT.

Sir *William Scott*.—This question arises on a claim made by the *Sparrow* sloop of war to participate in the benefit of a prize which was actually taken by His Majesty's ship *Hebrus*. The circumstances under which the claim is made are pleaded in an allegation, many points of which are admitted in the answers to be true. I may, therefore, take the allegation, or at least the greater part of it, as containing a fair and candid statement of what really occurred. The allegation pleads “ that on the 26th of *March* last, His Majesty's sloop *Sparrow*, *Francis Erskine Lock* esquire, commander, being on her passage from *Plymouth* with dispatches for Sir *Peter Parker* Baronet, Commander of His Majesty's ship *Menelaus*, cruising off *Belleisle*, for *George Tobin* Esquire, Commander of His Majesty's ship *Andromache*, cruising off *Bordeaux*, and for Rear-Admiral Lord *Amelius Beauclerck*, commanding His Majesty's ships in *Basque Roads*, was at ten o'clock A. M. of the said day standing “ to

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“ to the westward upon the larboard-tack, the  
“ *Lizard* bearing N. N. E., distant about thirty  
“ miles, and upon the partial clearing up of a fog  
“ which had prevailed for some hours previously,  
“ two enemy’s frigates (one under jury-masts)  
“ were discovered from the said sloop *Sparrow*  
“ under her lee on the opposite tack; that at such  
“ time a frigate, which from her manœuvres was  
“ supposed to be *British*, was also discovered from  
“ on board the *Sparrow* in the south-west quarter,  
“ but the aforesaid enemy’s two frigates were so  
“ close as to prevent the *Sparrow* from tacking  
“ and joining the said supposed *British* frigate;  
“ that shortly after the said two enemy’s frigates  
“ fired their broadsides upon the *Sparrow*, by  
“ which her hull, sails, and rigging were con-  
“ siderably damaged, and Mr. *Treglotion*, the  
“ master, was killed, and one seaman wounded.”

So that it seems there was an actual engagement between the *Sparrow* and the enemy, and this circumstance does, I think, discharge the legal prejudice which prevails against a constructive joint captor, whose claim is frequently founded on the mere accidental circumstance of being in sight, without any merit whatever. But in this case there was merit both of an active and a passive kind; the *Sparrow* was not only diligent in drawing the attention of His Majesty’s other ships to the enemy, but she likewise suffered considerably in the action with these vessels of superior force. This at once takes away the legal prejudice against her, and raises a presumption that she would not easily give up the pursuit, but would persevere in her  
utmost

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utmost endeavours as long as there was any prospect of success. It lays a strong ground of probability that this claiming ship would do every thing she could to consummate the capture, and relieves her altogether from the general effect of the prejudice against the claim of joint-captors. The allegation goes on to plead “ that the aforesaid “ frigate in the S. W. thereupon hoisted *British* “ colors and tacked to the southward, and the “ fog again coming on and concealing the move- “ ments of the *Sparrow* from the said two enemy’s “ frigates, she proceeded to join the said *British* “ frigate, and shortly afterwards the fog again “ clearing up, a line of battle ship, which had “ been attracted towards the spot by the firing “ before-mentioned, was observed from on board “ the *Sparrow* to the westward about six or seven “ miles, and the aforesaid *British* frigate was then “ observed to be in communication with her; that “ the *Sparrow* having joined and exchanged “ numbers with the said line of battle ship and “ *British* frigate, and found them to be His Ma- “ jesty’s ship *Hannibal*, Sir *Michael Seymour* “ Baronet, commander, and His Majesty’s frigate “ *Hebrus*, *Edmund Palmer* Esquire, commander, “ proceeded with them in chace of the said two “ enemy’s frigates, which then bore E. S. E., and “ were distant about seven or eight miles; that at “ half-past one o’clock, one of the said enemy’s “ frigates, which was under jury-masts, hauled up “ to the eastward, and was followed by the *Hannibal* “ and *Sparrow*, and the other enemy’s frigate bore “ up to the S. E. under a press of canvass, and a “ signal

“ signal was then made from the *Hannibal* (which  
 “ was commanded by the senior officer) to the  
 “ *Hebrus* to pursue her; and about two hours after  
 “ the same signal was made to the *Sparrow*; that  
 “ upon such last-mentioned signal being made,  
 “ the *Sparrow* discontinued the chase of the said  
 “ enemy’s frigate under jury masts, and together  
 “ with the *Hebrus* pursued the other enemy’s  
 “ frigate; and after a persevering chase of 120  
 “ miles, the said last-mentioned enemy’s frigate  
 “ was overtaken by the *Hebrus*.” Now from  
 these circumstances, a conclusion of law arises,  
 that these two vessels are to be considered as  
*Consorts*, not indeed to precisely the same extent  
 as if they had been associated by an order from  
 the board of admiralty; but, for this particular  
 business, they were associated by the order of a  
 superior officer commanding the *Hannibal*, and  
 were acting in obedience to his orders. For the  
 purpose therefore of this capture, they must be  
 considered as *Consorts*; and the law applicable  
 to *Consorts* must consequently be applied to the  
 consideration of any question arising between them.  
 The enemy’s frigate, it is pleaded “ was overtaken  
 “ by the *Hebrus* between one and two o’clock of  
 “ the morning of the 27th, and captured by her  
 “ after an obstinate contest, and proved to be the  
 “ *Etoile*, French frigate, the prize in question.” The  
 facts so far are all either clearly proved or admitted  
 in the answers; but those to which I must now  
 advert are in controversy between the parties.  
 The allegation goes on to plead what is very  
 important “ that the firing of the said action was  
 “ seen and heard on board the *Sparrow*; but from  
 “ her

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“ her inferior sailing,” (which I suppose was occasioned by her built as well as by the damage she received in the action), “ she was unable to partake in the contest, though she continued the pursuit, and made every exertion to close with the said *French* frigate ;” and it is further pleaded “ that at the time of the capture of the prize in question, the *Sparrow* was *in chace*.” Now taking this statement to be true, the conclusion of law necessarily follows, that the *Sparrow* is entitled to share in the prize ; for, I hold it to be a clear and indisputable rule of law, that, if two vessels are associated for one common purpose, as these vessels were, the continuance of the chace is sufficient to give the right of joint-capture. Sight under such circumstances is by no means necessary ; because, exclusive of that, there exists that which is of the very essence of the claim, encouragement to the friend, and intimidation to the enemy. Both the *Hebrus* and the enemy’s frigate knew that the *Sparrow* was astern, and that she was using her best endeavours to come up. The allegation goes further, and pleads what I think is not absolutely necessary to the support of the claim, that the *Hebrus* was within visible distance, and that the darkness of the night alone prevented her being seen. If this be proved, it follows, almost unavoidably, that she was chasing and endeavouring to come up at the time when the action and capture took place.

This is the statement of facts contained in the allegation ; and I come now to consider how it is supported by proof: I must confess that I am not a little surprised that some of the facts deposed to in the  
evidence



evidence have not found their way into the plea ; I allude particularly to a fact deposed to by the *French* witnesses. They speak of rockets being thrown up as signals by the *Hebrus*, and answered by the ship that was astern ; yet upon this important fact the allegation is altogether silent. Such a strong pregnant fact as this ought to have been pleaded, and then the Court and the Parties might have had the benefit of Captain *Palmer's* answer, admitting or denying the truth of it.

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I proceed now to examine with somewhat more particularity the evidence that applies to the contested facts in the cause ; for with respect to those stated in the plea relative to the earlier part of the transaction there is no dispute. The first witness is Mr. *Lawson*, who was the master's mate on board the *Sparrow* : What he says, is this, " that  
" after a persevering chase of one hundred  
" and twenty miles, the said last-mentioned  
" enemy's frigate (*L'Etoile*) was between one  
" and two o'clock of the following day, the 27th,  
" overtaken by the *Hebrus*, and captured by her  
" after a very obstinate contest," of which contest he could know nothing ; he goes on to say that  
" the firing of the said contest was seen and heard  
" on board the *Sparrow*," but he does not say that it was seen or heard by *himself*, or by *whom* it was seen or heard ; he merely echoes the words of the plea, and his evidence is altogether as meagre and unsatisfactory as it is possible for evidence to be. The next witness is Mr. *Denston*, who was first lieutenant of the *Sparrow*. He deposes much in the same stile with the former witness, but he adds one fact that is very material in the consideration of  
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this question, that the firing was heard on board the *Sparrow*, and was seen by himself from out of the *main-top*. The testimony of this gentleman to this fact is important, and goes as far as the evidence of a releasing witness can go, to establish the fact of sight. The other witness from on board the *Sparrow* is the surgeon, whose curiosity was not sufficient to keep him from his bed, to which he retired about 10 o'clock, and who can only speak from the information he received from others on the following morning. His evidence, therefore, amounts to just nothing. The testimony of releasing witnesses does not at any time possess great strength, but in this case it is, upon most points, particularly weak. Surely other persons might have been found on board the *Sparrow*, who could have furnished the Court with better information. The *French* witnesses certainly depose to the main facts in a much stronger manner, and I perceive no reason that could impel them to speak otherwise than the truth in this cause. Two of them are persons in an inferior situation of life, mere Fishermen, and therefore not subject to the objection that frequently occurs to the testimony of *French* officers, that they permit themselves to be carried away by their feelings, and are by no means disposed to allow that they could have been captured by any but a very superior force. These witnesses depose to the continued chasing on the part of the *Sparrow*, to the circumstance of rockets being thrown up after it was dark by the *Hebrus*, and answered up to the time of the commencement of the action by some vessel in the direction in which the *Sparrow* was last seen. This is evidence of no contemptible

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temptible kind, for it comes from persons who are perfectly disinterested, and to whom the Court is for that reason always inclined to pay great attention, especially when it finds, as in the present case, a foundation for their statement in the share which the *Sparrow* is admitted to have taken in the early part of the transaction.

To this case is opposed the evidence arising upon the log of the *Sparrow* herself. And I cannot but think that this is evidence of a very high class, though I have to lament that the entries in documents of this sort are not made or preserved with all that care and circumspection to which from their importance they are entitled. They may not only affect *the interest*, but *the honor and even the lives*, of the king's officers, for it is sometimes necessary to produce them as evidence on trials before courts-martial, whose duty it may be to decide upon the honor and the lives of those into whose conduct they are appointed to enquire. The log which is now produced is the captain's own log, kept indeed *by his clerk*, and *not by himself*; but it is adopted *by him*, and delivered in *as his own* to a public board. I must think that such a document stands very high in the scale of proof, especially against himself. The use intended to be made of this log by the party bringing it in, was to shew that the chase was, in fact, discontinued; and if there had been an entry clearly to that effect, I should have held the circumstance conclusive against the claim of joint-capture. An expression in the log about *shortening sail*, did appear to me so ambiguous, that I thought it necessary to require some explanation of its exact meaning. On the one side it was construed to mean that the vessel shortened sail in consequence

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of having given up the chase, which interpretation was denied on the other. The explanation which is now given by Captain *Lock*, certainly shews that the entry was somewhat inaccurately made, for it appears that the vessel did not shorten sail *generally*, as the expression would seem to imply, but shortened *some sails only*; that they *merely took in the starboard studding sails*, and that the effect of so doing was not to discontinue the chase, but to bring the *Sparrow* nearer to the prize. This affidavit of Captain *Lock's* is accompanied with an important document, a letter written and addressed by himself to Lord *Keith*, *recenti facto*, on the morning of the 27th of *March*, in which he states *that the firing was seen from the Sparrow, that every exertion was made to close, and that he did not give up the pursuit until day-break*, which is not very early at that period of the year, and must have been long after the capture had been completed.

Upon the whole, I think that the fact of sight, at the time of the action and capture, is made out, though I think it might have been proved in a more satisfactory manner. But taking the fact to be otherwise, and that there was no proof whatever of the *Sparrow* being in sight, still I think there is sufficient to establish the claim of that ship on the other grounds which I have mentioned. She was a consort of the actual captor, had pursued the prize in conjunction with her, and had not discontinued the pursuit at the time when the capture was consummated. I shall therefore pronounce for the claim of the *Sparrow*.

*Note.*—The Court made a similar decree in the case of the *Sultane*.

## FRANCIS AND ELIZA.

(Instance Court.)

**THIS** was a claim for salvage on behalf of Sir *Charles Thomas Jones* the Commander, and the officers and crew of His Majesty's sloop the *Harrier*, for services rendered to this convict ship in rescuing her from the possession of the convicts, and of the mutinous crew and soldiers on board her.

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A king's ship is not entitled to salvage for rescuing a convict vessel from the possession of the convicts and of the mutinous crew and soldiers on board her.

## JUDGMENT.

Sir *William Scott*.—The claim for salvage in this case rests on the circumstances which are detailed in the affidavit of Sir *Charles Thomas Jones*, and the exhibits annexed to it. He states, “ that on  
 “ the 11th day of *January* last, whilst proceeding  
 “ with his sloop into the roads of *Santa Cruz* in  
 “ the island of *Teneriffe*, he received a letter,  
 “ dated on the same day, from *John Duplan*  
 “ Esquire, the *British* vice-consul at *Santa Cruz*,  
 “ acquainting him that the above convict ship, the  
 “ *Francis and Eliza*, had arrived there on the pre-  
 “ ceding day in a state of revolt, and had been  
 “ put under quarantine, and requesting the  
 “ appearer's assistance to restore subordination  
 “ and order on board; that in consequence of the  
 “ said letter, the appearer, for the purpose of  
 “ affording the assistance required, ordered the  
 “ said sloop to come to an anchor, which was  
 “ accordingly done at about a quarter of a mile  
 “ from her; and the appearer, having learnt that  
 “ there were no sick on board the said vessel,

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“ waited upon the governor of *Santa Cruz* to  
 “ solicit her liberation from quarantine, in order  
 “ that he might render the assistance that had  
 “ been required of him more speedily and effec-  
 “ tually; but being unable to obtain the assent  
 “ of the governor to such liberation, he resolved  
 “ to place his own ship also under quarantine; and  
 “ having so done, and brought his said sloop close  
 “ under the stern of the said ship, he dispatched  
 “ gun boats to row round her; that at day-light  
 “ on the following morning, the appearer having  
 “ received a letter from *William Harrison* the  
 “ master, containing a statement of the circum-  
 “ stances under which the vessel had come to  
 “ *Teneriffe*, of his being deprived of all authority,  
 “ of the convicts being at liberty, of the mis-  
 “ conduct of the people on board, as well as of  
 “ the soldiers (who had been sent to maintain  
 “ order, as is usual in ships of that description),  
 “ in being perpetually drunk, and plundering  
 “ and destroying the stores and provisions, and  
 “ the said letter also requesting the appearer’s  
 “ assistance to enable him, the said *William*  
 “ *Harrison*, to recover him his command, he  
 “ immediately boarded the vessel with three of  
 “ his officers, and a party of marines, when he  
 “ found the ship in the full possession of the  
 “ convicts, and every thing in the greatest dis-  
 “ order and confusion; that upon the representa-  
 “ tion of the master of the violent and disorderly  
 “ conduct of the chief mate and four of the  
 “ seamen, corroborated by, Ensign *Steadman* of  
 “ His Majesty’s 46th regiment, who was in com-  
 “ mand of the soldiers on board, as well as by

“ Mr. *Gerling*, the first advocate to the crown at  
 “ *New South Wales*, and by the other passengers,  
 “ the appearer removed the said five persons  
 “ from the said ship to his own sloop, and ordered  
 “ a court-martial upon such of the soldiers as had  
 “ been most guilty of mutinous and unsoldierlike  
 “ conduct, and which court-martial awarded a  
 “ severe punishment, which they accordingly  
 “ underwent; that the appearer afterwards ordered  
 “ a survey of the stores and provisions which  
 “ remained on board, and which belonged to His  
 “ Majesty’s government, and having procured  
 “ wood from the shore by the assistance of the  
 “ *British* consul, he dispatched the carpenters of  
 “ the *Harrier* to put up the bulk-heads, which had  
 “ been broken down during the said revolt, and  
 “ to furnish other necessaries, for the purpose of  
 “ confining the convicts, which they accordingly  
 “ performed; and the appearer having succeeded  
 “ in restoring order, and in confining the con-  
 “ victs, put the master into possession, who  
 “ accordingly resumed the command, by which  
 “ means she was shortly afterwards enabled to  
 “ prosecute and did prosecute her voyage.” This  
 is the account given by Sir *Charles Jones*, and he  
 is fully borne out in his statement by the several  
 letters from the master and others annexed to his  
 affidavit. It is upon these acts, in themselves  
 laudable and meritorious, that the claim to salvage  
 is founded. Certainly it has been determined by  
 this Court, as far as Its authority goes, that king’s  
 ships may acquire a title to civil salvage by  
 assistance rendered to vessels in distress, even  
 where that distress does not arise from the

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dangers of the sea, and where the assistance is not of a maritime kind; but the Court has not been in the habit of considering such services, unless they have been very splendid and extraordinary, as entitling the parties to a salvage reward. The case of the *Trelawney* (3 Rob. 216. and 4 Rob. 223.) which has been mentioned, was one of great and extraordinary merit, and was performed by the crew of one merchant vessel towards another, with which they had no particular connection. The *Trelawney* was in the complete possession of insurgent slaves, who had overpowered the master and the crew, and had obliged them to quit the ship. To deliver the vessel out of the hands of such persons, was equivalent to delivering her out of the hands of pirates; and it was but reasonable to consider the parties entitled to the same reward as if they had in reality rescued the property from piratical seizure. The salvors in that case compelled the crew of the *Trelawney* to return to the performance of their duty, they afforded them assistance in it, and finally succeeded in quelling the mutiny, and recovering possession of the ship, after a severe and heroic contest, and that too with persons of a very desperate description: it is impossible therefore to state a case of greater merit than that was; and it was under the very peculiar circumstances attending it that the Court thought itself justified in applying the principle of salvage. The case which is now before the Court, is, I think, of a much slighter kind; for, although the remote consequence of what was done by Captain Jones has been that the ship was ultimately enabled to pursue her voyage; yet



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yet it by no means follows, as a necessary consequence from that, that he is entitled to a salvage remuneration. Whether any application for assistance was made to the *Portuguese* government does not appear, though I cannot but think that such application must have been made, and that such assistance would, without any long delay, have been afforded. If the case had occurred in this or any other civilized country, the natural resort would have been to the authorities of the place, and not to a ship of war of the same country, which might happen to be lying in the port. Application was, however, made in the present case, to the *British* vice-consul at *Santa Cruz*; and he, it appears, requested Sir *Charles Jones* to give him assistance. His letter is by no means immaterial. He says, "the crew are in a state of revolt, in want of provisions, and put under quarantine for ten days. In this case I beg you will give *me* your assistance to replace subordination and order." The vice-consul, therefore, is the principal in the business. He it is who, as the representative of the *British* government, applies to Captain *Jones*, and it is under his authority and by his directions that the necessary operations are performed. The steps which were taken were certainly prudent and proper under the circumstances, but they do not appear to have been of a very hazardous description. Captain *Jones* goes with a military force, to which no resistance is offered, nor do I suppose it was likely, or indeed possible, that any effectual resistance could have been made, for the persons on board the vessel appear to have been in a state of riot

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and tumult proceeding from drunkenness, rather than to have formed any deliberate plan for running away with the vessel. He takes out the persons who had been most disorderly, and orders a court-martial upon such of the soldiers as had been more guilty than the others of mutinous and unsoldierlike conduct. He also sends his carpenters on board to repair the bulk-heads, which had been broken down during the revolt, and having, by the assistance of the vice-consul, procured wood from the shore, he sends it on board. All this is very proper and praiseworthy conduct on the part of Captain *Jones*, but not such as will give him a claim to salvage. Although the consequences were certainly very beneficial to the owners, yet the service was so slight in its immediate act, and so entirely unaccompanied with personal danger or difficulty of any kind, that I do not think they are called upon to remunerate it in a pecuniary way. I do not mean to say that the king's officers would universally and in all cases be excluded from salvage for services rendered by them in rescuing vessels from other than maritime dangers, but still it is their duty to render such assistance without having any such object in view; and unless they incur great personal danger and use very great exertions in the performance of the service, I must hold that they are not entitled to a pecuniary reward. I think there was no such danger and no such exertion in the present case. It was the suppression of riot and disorder on board a *British* ship in a foreign port, which was executed without danger and under the superintendence

intendance of the civil authority. Captain *Jones*, having the command of a vessel employed in the public service, was called upon to interfere by the representative of the *British* government, and would have been liable to censure if he had refused to afford his assistance. Suppose there should be riot and insubordination on board a foreign ship lying in the *Thames*, and a military officer, acting under the authority of the civil magistrate, should proceed to quell it, would that give him a title to salvage? I think certainly not. I do not feel myself justified in pronouncing that salvage is due to Captain *Jones* and his crew; but as the case has been properly brought before the Court, I shall allow the expences.

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## LA MELANIE, LAFITTE.

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A claim of joint-capture may generally be sustained by a king's ship on the ground of sight only ; but this rule is liable to exceptions.

**THIS** was the case of a vessel under *French* colors, and laden with a cargo of cotton, which, in the prosecution of a voyage from *New Orleans* to *Bordeaux*, was captured on the 8th of *March* 1813 by His Majesty's ship *Briton*, Sir *Thomas Staines* Commander, and brought to the port of *Plymouth*. A claim of joint-capture was given on behalf of a squadron of His Majesty's ships, which were lying at anchor in the *Basque Roads*, under the orders of Rear-Admiral Sir *Harry Neale*, and employed in blockading the enemy's ships at the *Isle of Aix*.

## JUDGMENT.

Sir *William Scott*.—This is a claim on the part of a *British* squadron, consisting of His Majesty's ships the *Ville de Paris*, *Warspite*, *Rippon*, *Sultan*, and *Rover*, to share in this *French* vessel and cargo, which was taken, on the 8th of *September* 1813, by His Majesty's frigate *Briton*, under the command of Sir *Thomas Staines*. The case on the part of the actual captor is stated pretty much to the following effect : That the *Briton* was upon her station, off *Bordeaux*, on the 8th of *September* at about half-past ten o'clock A. M., *Cordovan* lighthouse bearing about E. S. E. five leagues, when a strange sail was discovered in the north-west quarter, steering for *Bordeaux* ; that the *Briton* made sail in chace, when such vessel hauled her wind and also made all sail, the wind N. W., and between two and three o'clock the *Briton* made the *Isle of Oleron*, and soon afterwards saw the mast-heads of the

the ships of His Majesty's squadron, off *Basque Roads*, over the island, at anchor; and about five o'clock the *Briton* made her distinguishing signal to the admiral, the *Briton* being at such time between the chace and the shore, and after firing several guns at her came up and captured her about seven o'clock in the evening, the fleet still continuing at anchor. This is the statement on the part of the *Briton*, and it is likewise admitted by Sir *Thomas Staines* in his answers, that "he believes the capture may have been observed from the squadron." The case on the part of the squadron does not differ very materially from that which has just been stated. Their allegation pleads "that His Majesty's ships *Ville de Paris*, *Warspite*, *Sultan*, *Rippon*, and *Rover*, composing a squadron under the orders of Rear-Admiral Sir *Harry Neale*, Bart. being at anchor in the *Basque Roads* on the 8th day of *September* last, and employed in blockading the enemy's ships in the *Isle de Aix*, about three o'clock P.M. of the said day, two strange sail were observed from the said squadron in the offing, one of which was clearly discerned to be a frigate with a signal flying at her mast-head, and the other sailing free, and standing in for the land; that the latter vessel was shortly afterwards perceived by those on board the squadron, to haul close upon a wind, and to use every endeavour to make her escape from the frigate; that the said frigate thereupon hauled down the said signal, and made all possible sail in chace of the said strange vessel; that at forty-seven minutes past four of the same day, the said frigate being off the *Chasseron* lighthouse, made her number to the admiral of the said squadron, and was

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“ found to be His Majesty’s ship *Briton*, Sir Tho-  
 “ mas Staines knight, commander; that shortly  
 “ afterwards the *Briton* made a signal to the ad-  
 “ miral that *the chace was an enemy*; that the said  
 “ vessel still continued her endeavours to escape,  
 “ and kept all sail making for the land, but was  
 “ prevented from bearing up for *Rochelle or Aix*  
 “ *Roads, the nearest ports for escape, by the posi-*  
 “ *tion of the said squadron*; that the *Briton*, con-  
 “ tinuing in chace of the said vessel, about  
 “ twenty-five minutes past five o’clock of the  
 “ said day, was observed to fire several guns  
 “ at her; that at thirty-five minutes past six  
 “ o’clock, the said vessel being *at the entrance of*  
 “ *the Basque Roads, the outer anchorage of the*  
 “ *said squadron*, the *Briton* came up with her,  
 “ when she surrendered to and was taken pos-  
 “ session of by the *Briton*, in sight of the whole  
 “ of the said squadron, and proved to be the  
 “ French schooner *La Melanie*, Lafitte master, the  
 “ vessel proceeded against in this cause; and  
 “ that from three o’clock of the said day until the  
 “ time of the capture of the said prize by the  
 “ *Briton* as aforesaid, the vessels composing the  
 “ said squadron were *in sight of both of the said*  
 “ *vessels*, and were so observed to be by those on  
 “ board the same; and that from the time of the  
 “ *Briton’s* making the signal that the chace was  
 “ an enemy as aforesaid to the time of capture,  
 “ any one or all of the vessels composing the said  
 “ squadron could and would have joined in the chace,  
 “ and have rendered any other actual assistance,  
 “ had it been necessary.”

The claim of the squadron therefore is put upon  
 two distinct grounds, on the fact of sight, and  
 on

on the power and inclination to have joined in the chace, had any assistance been at all necessary. There can be no doubt that sight alone is, between king's ships, *generally* sufficient to establish a claim of joint-capture. By sight, I understand *the being seen by the prize as well as by the captor*, and thereby causing intimidation to the enemy and encouragement to the friend. I am not aware that one of these will do without the other; but sight, even if proved in the fullest and most satisfactory manner, does not *universally* give a right to share. The presumption arising from it, like all other presumptions, may be rebutted or evicted by adverse circumstances; ships, for instance, which are lying in a harbour under circumstances which render it physically impossible for them to get out, cannot be permitted to share merely because they happen to be in sight when a capture is effected. Where there is no such physical impossibility, where ships are at sea and have it in their power to render assistance, still, if they are unconscious of what is going on, and are pursuing a different course in complete ignorance of the transaction, they have no more right to share than if they had been in the opposite quarter of the globe. In such circumstances they can occasion no terror to the enemy, nor afford any encouragement to the friend, and therefore they are justly deemed not entitled to a share of the benefit. It would not be difficult to put other cases of the same kind; one occurred in this Court in the year 1746, (the *Margaret, Martyn*.) In that case there were three ships asserting an interest, one of which (the *Queen* of

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*of Hungary*) was present at the time of capture, but performed no service. Another (the *Trial*) was in sight, but at a very considerable distance from the scene of action, and likewise performed no service. The third ship (the *Terrible*) engaged the enemy for three hours, and effected the capture. Sir *Henry Penrice*, who was at that time judge of the admiralty, awarded three-fourths of the prize to the *Terrible*, one-fourth to the *Queen of Hungary*, and nothing to the other ship, which performed no service, and was at a great distance, although within sight.

Where the claim is founded on the fact of sight by vessels lying in a harbour, there must, I think, be some such limit as this assigned to their claim; namely, that they must be in sight at the time when the capture is consummated; otherwise cases of the greatest hardship on the actual captor might frequently occur. Suppose, for instance, the case of a prize chased all the way up the channel; would it not be monstrous to say that all the ships in all the different harbours which they passed, and which happened to see a part of the chase, should be entitled to share with the actual captor? The utmost that can be admitted is, that those ships alone which witnessed the last act of the chase, —the consummation of the capture, should have a share of the prize.

It becomes necessary, therefore, to see what was the degree of sight in this case; how far it is proved at the time of capture. The account which Sir *Harry Neale*, who was the Commander of the squadron, gives, is this, that “ he saw and “ observed the two vessels in the offing from “ the



“ the deck of the *Ville de Paris*, one of which  
 “ he clearly discerned to be a frigate, with a  
 “ signal flying at her mast head ; and the other  
 “ (which was a smaller vessel) to be sailing free,  
 “ and standing in for the land towards the  
 “ north-west part of the *Isle of Oleron*, the wind  
 “ being about N. N. W. by compass ; that the  
 “ said signal on board the frigate could not be  
 “ distinctly made out, but it was soon after-  
 “ wards found to be a signal made to the other  
 “ strange sail ; for the latter vessel was soon after-  
 “ wards perceived by the deponent and others on  
 “ board the *Ville de Paris* to haul close upon a  
 “ wind, and to use every endeavour to make her  
 “ escape from the frigate ; and thereupon the said  
 “ frigate was also seen to haul down the aforesaid  
 “ signal, and to make all possible sail in chace of  
 “ the said strange vessel ; that about 47 minutes  
 “ past four of the same day, the said frigate  
 “ being off the *Chasseron* lighthouse, made her  
 “ number to the deponent as the admiral of the  
 “ said squadron of His Majesty’s ships, which the  
 “ deponent also saw ; and thereby she was found  
 “ to be His Majesty’s frigate *Briton* ; and shortly  
 “ afterwards, she made a signal to the deponent, as  
 “ the admiral aforesaid, that the chace was an  
 “ enemy, which said signal he also saw ; and that  
 “ the said vessel still continued her endeavours to  
 “ escape, and kept all sail, making for the land  
 “ towards the *Isle Rhé*, and then tacking to get off  
 “ the land, as if for the purpose of working round  
 “ the north-west port, to get into the *Pertuis*  
 “ *Breton* ; for she was prevented from bearing  
 “ for *Rochelle* or *Aix Roads* (the nearest ports for  
 “ her

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“ her escape) by the position of the said frigate  
 “ *Briton*, she being between the said strange sail  
 “ and those two ports ; and if the said frigate had  
 “ not been in that situation, the said strange sail  
 “ could not have made for *Rochelle* or *Aix Roads*,  
 “ without imminent danger of being captured by  
 “ the ships of the said squadron, or their boats :  
 “ And he further says, that having continued to  
 “ watch the said frigate and her chace, he observed  
 “ the said frigate to fire several guns at her, at  
 “ about five o'clock of the said day, or a few  
 “ minutes after that time, at which time the  
 “ *Briton* was from about 12 to 14 miles distant  
 “ from the said squadron ; for he could only see  
 “ the ~~barriade~~ *barriade* of her quarter-deck rising from  
 “ the water.” Now this is a very indistinct view  
 of the *Briton*, even at that time ; and, as to the  
 prize, the view must have been still more indis-  
 tinct, for it was a small loaded vessel, and of  
 course much lower in the water than the *British*  
 frigate : I think I have scarcely seen a more indis-  
 tinct account of sight in any case that has here  
 been brought to my notice.

Let us now look to the account given by the  
 witnesses produced from on board the prize.  
 The principal witness, *Lafitte*, who was master  
 of the captured vessel, says, “ there were not  
 “ any other ships in sight at the time of the  
 “ capture, other than parts of the masts of  
 “ vessels at a great distance being visible, and  
 “ which he believes were the masts of the ships  
 “ and vessels composing a *British* squadron at  
 “ anchor in *Basque Roads* on the coast of *France*,  
 “ but which in nowise contributed to the capture.”

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It appears then that he only saw *parts of the masts* of some vessels at a great distance, which at the time of his examination he understood to have belonged to the *British* squadron, but of which, having just come from *New Orleans*, he could have known nothing at the time of the capture. On the question of sight, therefore, it is impossible to say that this is not an extreme case: I think I do not go too far in describing it as a case of vision, as indistinct and distant as any I ever remember to have been brought to the notice of the Court. It appears to me that it would be carrying the principle farther than it has been carried by any former decision, if upon proof so indistinct as the present I were to pronounce for the interest for the squadron. The Court will entertain the ancient principle, but it will not extend it: it has already gone great lengths, and is not at all inclined to go beyond what has already been done, nor to carry the legal interpretation one step farther. If I were to pronounce for the claim of joint-capture, I should be acting in direct opposition to the case which has been cited (the *Margaret, Martyn*). The *Briton* was not only the prime mover, but the *sole* mover in the business, for it is not even pretended that the squadron made the slightest movement or exertion. It was by the act of the *Briton* only, that the prize was brought within sight of the other ships of the squadron, which were placed in a situation and under circumstances which rendered it almost morally impossible that they should be able to lend their assistance. They were employed in a blockade service, of the closest and strictest kind, for the purpose of watching vessels which were earnestly seeking an opportunity

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to escape. They were centinels on their post watching over prisoners anxious to run away. Blockading ships, it is true, are at liberty to take a prize if it comes in their way, but they are not to chase to a distance, for that would, in effect, be a desertion of the duty imposed upon them, and would amount to a breaking up of the blockade. It is not usual for more ships to be employed in maintaining a blockade than are absolutely necessary for that purpose. How many ships were actually blockaded in the present instance does not exactly appear, but there seems reason to believe that they were at least equal in number to the blockading fleet. It could, therefore, be hardly consistent with prudence to detach any portion of their force in pursuit of any other object. Here is another circumstance also very deserving of consideration. The different vessels of the squadron had their sails furled, and were at anchor, with the wind blowing strong into the bay, at the bottom of which they were lying. Indeed it seems admitted by Sir *Harry Neale* to have been very doubtful whether any one ship of the squadron could have come up with the prize, if it had not been for the position taken by the *Briton*. He says "it is a matter of doubt in his mind whether  
" any ship of the said squadron could have come  
" up with the said prize if, as soon as she could  
" see the said squadron, she had proceeded for  
" the river *Gironde*, or for the *Pertuis Breton* in  
" particular, and the said frigate *Briton* had not  
" been where she was."

Taking all these circumstances into consideration, that the chase was commenced by the *Briton*  
only;

only; that the prize would never have been seen by the squadron if it had not been for the acts of the *Briton*; that the squadron was engaged in a blockade of the strictest kind, which rendered it imperative on them not to desert their post; that they were lying at anchor, with their sails furled, in the bottom of a bay, into which the wind was blowing strong, I think I should be going farther than former cases would justify me in doing, if I were to pronounce for the interest of the squadron, and therefore I shall decide in favor of the exclusive claim of the *Briton*.

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## BALTIMORE, BAKER.

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Part of a ship's crew going on board a vessel found in distress and bringing her into port, have no exclusive claim to the salvage due for her preservation. Those who remained in their own ship, if equally ready to go, are equally entitled to the reward.

THIS was the case of an *American* vessel, laden with a cargo of various merchandize, which, in the prosecution of a voyage from *Liverpool* to the port of *Baltimore* in *America*, met with very tempestuous weather, and suffered considerable damage. On the 4th of *March* she fell in with His Majesty's post office packet *Rapid*, at which time she was very leaky, having four feet water in her hold, one of her pumps split, and the other choaked, her fore and main top masts, and also the head of her foremast gone, and her ensign union down as a signal of distress. Nine of the men on board were from sickness unable to perform their duty, and the rest of the crew were in a state of great exhaustion. Under these circumstances the *American* master and his men were at their own earnest solicitation taken on board the *Rapid*; and he then signed a certificate of the absolute abandonment of his ship and cargo to Captain *Steriker*, the commander of the packet, who immediately inquired of his officers and crew, whether they were inclined to volunteer their services, and endeavour to save the vessel and cargo. With the exception of one man, they all expressed their readiness for the service, and *Herron* the mate, and ten of the packet's crew were sent on board the *Baltimore*, taking with them a supply of the necessary articles for the use of the vessel. Previous to quitting the packet, *Herron* signed an agree-

agreement that all the emoluments arising from the service of saving the ship and cargo, should be applied for the general benefit of the crew of the *Rapid*. On the 10th of *March*, the salvors succeeded in bringing the *Baltimore* and her cargo safe into *Falmouth*; and proceedings were soon afterwards instituted in the Admiralty Court. The question was, how much should be awarded for salvage; and, secondly, to whom, and in what proportion the sum so awarded should be distributed.

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On behalf of *Herron*, and the men who accompanied him on board the *Baltimore*, *Arnold* insisted, that a very large remuneration was due for the difficult and dangerous service that had been performed, and that the ship and cargo having been preserved by *their exertions exclusively*, they were *exclusively entitled to the reward*. That the certificate signed by the mate, admitting the right of the captain of the *Rapid* and the rest of the crew who remained on board that ship to participate in the salvage, ought not to be enforced against him, as having been obtained hastily and without examination on his part during the bustle and confusion that necessarily took place, whilst they were removing from one ship to the other. That, at all events, the agreement would be binding on himself only, and could not in any degree affect the interests of the other acting salvors.

For the Captain, and the part of the crew who remained on board the packet, the *King's Advocate* and *Lushington* contended, that he was the *dux facti*, the author and conductor of the enterprise,

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prize, and that he was therefore to be considered the principal salvor. That in consequence of the absence of those who were permitted to go on board the *Baltimore*, the remainder of the crew had a double duty to perform on board their own ship, and double labour to undergo. That as all were equally ready to perform the service, all ought in justice to share equally in the profits arising from it. That it was unusual to make a distinction between those who went on board another ship for the sake of preserving it, and those who enabled them to do so by remaining to perform the whole of the duty on board their own ship. That the same principle prevailed in the Prize Court, in which it is held, that a ship, coming in sight only at the moment of surrender, has a right to share equally in the prize with the actual captor, who has, perhaps, sustained a long and severe engagement with the enemy.

The owners of the packet also put in their claim to share in the salvage, on the ground that the safety of their vessel was endangered by the weakening of their crew, and that they must have become responsible for a very large sum of money, 283,069 dollars, which were on board the packet on freight, had any loss occurred in consequence of the assistance rendered to the *Baltimore*. They likewise claimed the value of the sails and stores supplied from their packet.

For the owners of the *Baltimore*, *Adams* contended, that although a salvage was certainly due for the service which had been performed, the amount of it ought not to be very considerable, as no great risque  
of



of life had been incurred. That, in consequence of the dispute amongst the salvors, the *American* owners had been improperly put to an additional expence. That an intervention, not only novel but reprehensible, had been made by the owners of the packet, and an additional proctor and counsel employed unnecessarily on their behalf. He therefore submitted, that the Court, in settling the quantum of salvage, ought to take into its consideration the additional expences which had been saddled on the owners.

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## JUDGMENT.

Sir *William Scott*.—This is a case of very considerable merit on the part of the salvors, who found the vessel in a disastrous and dismantled state in the *Bay of Biscay*. Part of her crew, it appears, had suffered so severely from illness and fatigue, that they were unable to perform their duty on board her: Others of them were unwilling to do their duty, and all of them were willing enough to escape from her. The case, therefore, approaches as nearly as possible to one of absolute derelict, for although the crew had not actually abandoned the vessel, they had every desire to do so, and seized with eagerness the very first opportunity that offered itself for that purpose. When His Majesty's packet came up, the master of the vessel represented the state of his ship, and requested that himself and his men should be taken on board the packet, which was accordingly done. In the act on petition which has been given in on the part of the owners, some sort of charge, though not of a very definite kind,

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kind, is made against the salvors, as if they had unduly constrained the master and crew to desert their ship, but there is no evidence whatever in support of the charge, and it has therefore been very properly abandoned by the counsel in their argument. It cannot be denied that there was a good deal of merit in the manner of bringing the vessel safely into port. It appears that, on the suggestion of the commander of the packet, the attempt to save this vessel was undertaken. He called upon his men to volunteer their services for this purpose, and with the exception of one man, (who of course cannot be considered as a salvor), they were all willing to make the attempt. Now, looking to the condition in which this ship was when she was met with by the king's packet, looking to the measures which were so promptly and so successfully made use of for her preservation, and looking also to the danger that must have been incurred, (for it is impossible that a voyage from the *Bay of Biscay* to *Falmouth* at this season of the year, and with a vessel in the state in which this vessel was, could have been unaccompanied with danger), it appears to me that I do not overstep the bounds of equity when I award the sum of £800 for salvage.

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The next question is amongst whom, and in what proportion, this sum shall be divided. There can be no doubt whatever that the claim of the captain of the *Rapid* is well founded, for he is the life and soul of the whole business. His right to reward is indisputable, and I shall give him the sum of £100, to which I think he is fully intitled, as a sort of *flag eighth*. With respect to the con-

test

test which exists between those who went on board the *Baltimore*, and became the immediate instruments of preserving her, and those who remained on board their own ship, I confess I can see no sufficient ground for making a distinction between them, and consider it but fair to hold that they are all equally entitled to be rewarded. All of them, it is true, did not go on board the *Baltimore*, but they were all (with one exception) ready to do so, and a selection of part of them became necessary, which was accordingly made, and I have no doubt properly made, by their commander. As all of them concurred in their readiness to go, They are all equally deserving of reward; and this indeed seems to have been the instinctive opinion of the men themselves, for an agreement was entered into by them to that effect. It is said, however, that this agreement would be binding only on the individual who signed it, and on no one else; but surely the effect of it would by no means be confined to him. For though he is but *mate* of the packet, he, in point of fact, becomes *master* of the *Baltimore*, and in that character his act would (for a purpose of this sort at least) be binding upon all those whom he took under his command. I cannot permit it to be averred, that he signed this paper without having any knowledge of its contents; at the same time, it must be admitted that he is entitled to a considerable reward for the services he performed, and I shall, therefore, give him the sum of £80. The rest I shall distribute equally amongst the crew of the packet, with the exception of the man who refused his services; and his share, under the circumstances, ought

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ought to be given to the carpenter, in addition to his own share. With respect to the claim of the owners of the packet, they are certainly entitled to receive the value of the sails and stores which were supplied from their vessel, and also the amount of any other loss or expence which they may have fairly incurred ; but I cannot approve of their coming here and employing a separate proctor, and by so doing, putting the owners to an additional and unnecessary expence. They might, with the same effect, and in a manner equally beneficial to their own interests, and certainly less injurious to that of others, have stated their demands in an affidavit, without writing to the act as they have done, and therefore it is somewhat hard to hold the owners of the *American* ship responsible for the expence incurred by their proceedings in this suit. I desire the costs may be strictly taxed.

The value of the property saved was about £1,900.

## HERO, HOWARD.

THIS was a cause of bottomree, brought by Mr. *Adonis Coates* of *Liverpool*, the holder of an instrument, purporting to be an hypothecation bond\* for £900, with maritime interest after the rate of £10 *per cent.* against the ship, cargo, and freight and also against Messrs. *Donald* and son, the owners.

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Semble that the agent of the owner may, under circumstances, take a bottomree bond by way of security for advances made by him.

JUDG-

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\* The following is a copy of the bond :—

Know all men by these presents, that I, Andrew Howard, master of the ship or vessel called the *Hero*, of Saint John's, New Brunswick, at present in this port of *Liverpool*, in the county of *Lancaster*, in that part of the united kingdom of Great Britain and Ireland called *England*, am held and firmly bound to *Adonis Coates* of *Liverpool* aforesaid, merchant, in the penal sum of one thousand nine hundred pounds of lawful money of Great Britain, to be paid to the said *Adonis Coates*, or his certain attorney, executors, administrators, or assigns; for which payment well and truly to be made, I bind myself, my heirs, executors, and administrators, and every of them, and also the hull, tackle, and appurtenances of the said ship, and the cargo now laden on board thereof, together with the freight for the same as hereinafter mentioned. Sealed with my seal: Dated this twenty-seventh day of October one thousand eight hundred and fifteen.

Whereas the said ship *Hero* hath lately arrived in the port of *Liverpool*, from the port of Saint Andrew's, New Brunswick, and the said ship has been consigned, by the owner thereof, to the said *Adonis Coates*, and the said ship being in want of some repairs and of several articles to enable her to proceed on the voyage to Saint John's aforesaid, and back to the port of *Liverpool* aforesaid, and the said master being also in want of money to defray the necessary disbursements and expences of the said ship in *Liverpool*,  
hath

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## JUDGMENT.

Sir *William Scott*.—This is a demand made by the holder of a bottomree bond, granted to Mr. *Adonis Coates* by the master of the ship *Hero*, belonging to *New Providence* in *America*. It is unnecessary for me to say that bonds of this description,

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hath applied to the said *Adonis Coates* to lend and advance to him a sufficient sum of money for those purposes : And whereas the said *Adonis Coates* hath consented to lend and advance the said money on security of the hull, cargo, and freight, and the said *Andrew Howard* hath accordingly taken up, upon the adventure of the said ship or vessel, the sum of nine hundred pounds of lawful sterling money of Great Britain, and which said sum of money the said *Adonis Coates* lent and supplied to the said master, at the rate of ten pounds per cent. on the said sum of nine hundred pounds, during the said voyage, and has consented and agreed to stand and bear the hazard and adventure thereof on the hull, tackle, apparel, and furniture of the said ship or vessel during the said voyage, so as the same do not exceed the term of six calendar months (to be computed from the date thereof) : Now therefore know ye, that I, the said *Andrew Howard*, do by these presents, for myself, my executors and administrators, covenant and agree to and with the said *Adonis Coates*, his executors, administrators, and assigns, that the said ship or vessel shall and will with all convenient speed set sail and depart from Liverpool aforesaid, and shall, as directly as wind and weather will permit, proceed to St. John's and back to Liverpool aforesaid, and there end the said voyage ; and the said *Andrew Howard*, in consideration of the said sum of nine hundred pounds of lawful sterling money of Great Britain, paid by the said *Adonis Coates*, do hereby bind myself, my heirs, executors, and administrators, and particularly the said ship *Hero*, and her cargo and freight, and the boats, tackle, apparel, furniture, and appurtenances of the same, unto the said *Adonis Coates*, his executors, administrators, and assigns, for the due and punctual payment of the said sum of nine hundred pounds of lawful sterling money of Great Britain, with maritime interest thereon, at and after the rate of ten per cent, within ten days next after the arrival

tion, when entered into fairly and *bond fide*, are very favourably regarded in this Court. They are given as security for money advanced for the necessary use of a ship in a foreign port, where the owners and the master have no personal credit, and

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arrival of the said ship or vessel at Liverpool aforesaid, or at the end or expiration of six calendar months, to be computed as aforesaid, which of the said terms shall first and next happen ; and in case the said sum of nine hundred pounds of lawful sterling money of Great Britain, with such maritime interest, shall not be duly and punctually paid, then with interest at and after the rate of five per cent. of like lawful money, to be computed from the day the said sum of nine hundred pounds, with maritime interest, shall become payable as aforesaid, until the day the same shall be actually paid as aforesaid : And I, the said Andrew Howard, do for myself, my heirs, executors, and administrators, hereby further covenant and agree to and with the said Adonis Coates, his executors, administrators, and assigns, that I, the said Andrew Howard, at the time of the sealing and delivery of these presents, am the true and lawful master of the said ship or vessel ; and that I have power and authority to charge and engage the said ship, her freight, cargo, and appurtenances as aforesaid ; and that the said ship and her cargo, and also her boats, tackle, apparel, and furniture, and her freight, shall at all times after the said voyage be liable and chargeable for the payment of the said sum of nine hundred pounds of lawful sterling money of Great Britain, and maritime interest, and with lawful interest thereon, to be computed as before mentioned and agreed upon, and according to the true intent and meaning of these presents : And lastly, it is hereby declared and agreed between the said parties to these presents, that in case the said ship or vessel shall be lost or cast away before her arrival at St. John's aforesaid upon the said intended voyage, that then the payment of the said sum of nine hundred pounds, with maritime interest, or any part thereof, shall not be demanded or recoverable by the said Adonis Coates, his executors, administrators, or assigns, but shall cease and determine, and the loss thereby wholly borne and sustained by the said Adonis Coates, his executors and administrators ; and that  
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and where, without such assistance, the ship must continue to lie until it becomes rotten and useless. It is highly expedient, therefore, that they should be upheld with a vigorous hand. The principle on which they are founded and supported is of great antiquity, and deeply radicated in the general maritime law, from which it has been transplanted into the law of this country. Where the master cannot procure the necessary supplies on the personal credit of himself or his employers, there can be no doubt that he is at liberty to pledge the ship itself, by way of security, to the lender, and to stipulate for the payment of interest after a rate which, in cases of bonds granted under other circumstances, would be deemed usurious.

It is said that this bond is objectionable on the face of it,—that Mr. *Coates*, although he is to receive an extraordinary and maritime interest, is not to take upon himself the risk of the whole voyage. The vessel, it appears, was to commence her voyage at *Liverpool*, to go to *St. John's* in the island of *Newfoundland*, and to return to *Liverpool*, but the outward voyage only was to be at the risk of the lender. But the objection is hardly to be deemed a fatal one. The lender was to be entitled to an

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then and from thenceforth, every clause, matter, and thing herein contained, on the part and behalf of the said Andrew Howard, shall be void; any thing herein-before contained to the contrary thereof notwithstanding. In witness whereof I, the said Andrew Howard, have hereunto set my hand and seal, the day and year first above written.

Sealed and delivered in } ANDREW HOWARD, (L. s.)  
the presence of

THOMAS RICHARDSON.

interest



interest of £10 *per cent.* (certainly not an extravagant rate of interest on a maritime bond) until the arrival of the ship, or for a certain specified time, and after that he was to receive common interest only. It appears, therefore, when duly considered, to be little more than a bond for maritime interest on the voyage to *St. John's*, and a postponement of the payment of the money until the arrival of the ship at *Liverpool*. The bond, then, would have been more properly expressed, if it had stated that the money was lent on a voyage from *Liverpool* to *St. John's* only, and not back again to *Liverpool*. This would certainly have been more regular; but it appears that the ship was expected to come back, and that the party was willing the payment should be postponed until the time of her return. Under these circumstances the objection to the bond cannot be regarded as fatal.

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Another objection has been raised of a different kind. It is said that the bond is not good, because it is granted to *the agent of the owner*, who is bound to supply the necessary funds for the disbursements of the ship, without looking to a bottomree bond to secure the repayment of the money. It has been argued, and with apparent propriety, that a person to whom the ship is consigned by the owner, and who must be in constant correspondence with him, ought to make the necessary advances, without demanding maritime interest, and it has been truly said, that a party is not at liberty to act as the agent of the owner, and at the same time to take upon himself the character and privileges of a stranger; to act as if there were a necessity, when no necessity

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cessity exists. The case of necessity, which is the foundation of a ~~bottomree bond, does not arise~~ where there is credit existing on which money can be obtained without resorting to the ~~real security~~ of the ship.

At the same time I will not take upon myself to lay it down as an universal proposition, that an agent may not, under any circumstances, take the security of a bottomree bond. Cases may possibly arise in which an agent may be justified in so doing. It can be no part of his duty to advance money without a fair expectation of being reimbursed, and if he finds it unsafe to extend credit to his employers beyond certain reasonable limits, he may then surely be at liberty to hold hard, and to say, I give up the character of agent, and, as any other merchant might, to lend his money upon bond, to secure its payment, with maritime interest. If in such a case, he gives fair notice that he will not make any further advances as agent, and affords the master an opportunity of trying to get money elsewhere, and the master is unable to do so, but is obliged to come back to him for a supply, then, he is fairly at liberty, like any other merchant, to advance the money on a security that is more satisfactory to himself. I will not say that the case might not go further. If the agent had given credit for all the disbursements of the ship, and found, contrary to his expectations, that they amounted to more than he calculated, and went beyond any advances which he might reasonably be called upon to make on the mere personal credit of his employers, and if there was no time to look to other quarters for assistance, he might possibly be justified

justified in resorting to this species of security, giving ~~the earliest notice of the necessity under which he acted.~~ Under such circumstances he might not, perhaps, be out of the reach of the protection which a bottomree bond would afford him.

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Subject to these observations, I come to the consideration of the present case. Mr. Coates says, “ that he had various transactions in “ business with Messrs. *Donald* and Son, of “ *Saint John’s* in the province of *New Brunswick*, “ merchants, and in the month of *September* 1815, “ the sum of £3,792 14s. 10d. was due to him, “ this deponent, on the balance of accounts “ between them; and he further made oath, that “ on the arrival of the said ship *Hero* and her “ cargo at *Liverpool*, in the said month of *Sep-* “ *tember*, he disposed of the said cargo, the net “ proceeds whereof, amounting to the sum of “ £3,139 13s. 4d., he placed to the credit of the “ said Messrs. *Donald* and Son, in their account “ with him; and the said vessel being in want of “ some repairs, and the said master having sent “ various bills to this deponent for payment, to a “ considerable amount, for the disbursements of “ the said ship, and this deponent having paid “ several sums, but finding that the total disburse- “ ments of the said vessel to clear her outwards “ from the said port of *Liverpool* on her return “ voyage to *New Brunswick*, exclusive of the “ insurance, and of the cost of her return cargo, “ which he was directed to purchase by Messrs. “ *Donald* and Son, would amount nearly to the “ sum of nine hundred pounds, he refused to “ advance the same, and thereby increase the con- siderable

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“ siderable balance which would, besides such dis-  
“ bursements, be due to him when the said ship  
“ should be cleared out, unless the said master  
“ would, in the first instance, undertake to give  
“ him a bottomree bond for the whole amount  
“ of such disbursements, when such amount should  
“ be ascertained ; and he further made oath, that  
“ he did not make use of any threat or influence  
“ whatever to compel or induce the said *Andrew*  
“ *Howard* to sign and execute such bond, for that  
“ when he, this deponent, first required the said  
“ bottomree bond from the said master, which the  
“ deponent believes might be on or about the  
“ 20th of the said month of *October* 1815, at which  
“ time this deponent had not paid more than the  
“ sum of £321, the said master, on being made  
“ acquainted with the state of accounts between  
“ the said Messrs. *Donald* and Son and this de-  
“ ponent, agreed to take up a sufficient sum of  
“ money upon bottomree for the whole disburse-  
“ ments of the said ship without any hesitation,  
“ and on the 27th day of *October* 1815 he duly  
“ executed a bottomree bond accordingly.” Now  
the master positively swears, in a manner that I  
cannot but think much more precise and definite,  
“ that it was not until the 26th or 27th day of  
“ *October* 1815, when the said ship was cleared  
“ out and ready for sea, that the said *Adonis*  
“ *Coates* for the first time proposed to this de-  
“ ponent that he should give him a bottomree  
“ bond.” I need not say that the bond cannot  
extend to the sum of three hundred pounds, which  
had been expended before any mention what-  
ever was made of a security of this kind. It  
cannot.

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cannot be carried back to cover the money which had before been advanced on personal credit. If money is advanced on the understanding that there is to be an hypothecation, then the execution of a bond may be delayed until the whole amount of the expences, and of the money necessary to defray them, shall have been ascertained and advanced, but it can have no reference to money which was advanced before any such security was in contemplation. Although it is not usual in courts of common law to hold that a bond may be good in part, and bad in part, yet in the equitable consideration which this Court is in the habit of applying to cases of this kind, such a distinction may be very properly admitted. The bond may be valid for the money advanced *with the view to its security,* although it is altogether void with respect to that which was paid *alio intuitu.* Of the truth of the account given by the master, that the bond was not in the contemplation of the parties until the ship was cleared and ready to sail, there seems to be no reason to doubt. I have already observed, that if the amount of disbursements came by surprize upon the agent, he might perhaps take the security of a bond for the excess beyond that upon which he reasonably calculated. But does that appear to have been the case in the present instance? The master swears positively that "all the expences" were incurred under the orders and directions "given by him the said *Adonis Coates,* as the "agent and correspondent of the owners." If *He* then was the person who from the first ordered the disbursements, and if he did so in the character

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racter of *Agent*, I do not think he is now at liberty to turn round and demand the security of an hypothecation bond, as if he were a perfect stranger to the owners, and had never intermeddled in the transaction. If he had not actually advanced the money for the repairs and disbursements of the vessel, he had given the orders and made himself responsible for the payment of them, which is for this purpose equivalent to an actual advancement of the money. I must, in the next place, observe, that there are other considerable differences between the account given by the master, and that of Mr. *Adonis Coates*. The master says, “ that had the said *Adonis Coates* signified to  
“ him his intention not to have advanced money  
“ for the disbursements of the ship, except upon  
“ bottomree, he would not have accepted such  
“ advances on that condition; but would, before  
“ resorting to means so injurious to his owners,  
“ have endeavoured to raise the necessary supplies  
“ on the personal credit of the said Messrs. *Donald*  
“ and Son, which might have been effected,  
“ as he verily believes.” The ship, however, was ready to sail, and any delay at that time, for the purpose of endeavouring to get the money elsewhere, might have been still more prejudicial to the interest of the owners than a compliance with Mr. *Coates*’s demand. Surely this approaches something very near to a case of compulsion. The master was reduced to the necessity as it were of complying with the proposal made by Mr. *Coates*: He swears, “ that Mr. *Coates* particularly requested him to conceal the fact of  
“ the said bond having been given from the said  
“ Messrs.

“ Messrs. *Donald* and Son, his owners ; assuring  
 “ him, upon his word of honor, that the said bond  
 “ should never be put in force to the disadvantage  
 “ of his said owners, unless untoward circum-  
 “ stances obliged him to enforce the same.”

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Mr. *Coates* represents the matter very differently, and positively denies that “ he ever gave any assurance in any respect, that he would not put the same in force ;” but I observe, that in the letter which he writes on the next day to the owner, he says not one word about this bond. He was continuing his correspondence with the owner as *Agent*: He mentions these very sums in his account ; but not as if he charged them, or as if they were due to him, in any other character than as *Agent*. No intimation whatever is given that he had advanced the money upon the security of an hypothecation bond : Upon that subject he is altogether silent. I really feel great difficulty, under such circumstances, in pronouncing for the validity of this instrument. Looking to the statement made by the master, that the disbursements were ordered by the agent himself ; that he believes he could have got the money elsewhere ; that no mention was made of the bond, until the ship was actually ready to sail ; and looking also to the letter and account of the agent himself, in which he is quite silent respecting the bond, I must take the master’s to be the true account of the transaction. His conduct is, I observe, spoken of in the highest terms ; and he is eulogized throughout by Mr. *Coates* himself, who, speaking of him in his letter to the owner, says, “ He has been as frugal, careful, and attentive as possible : I shall be very

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“ sorry if he leaves the ship.” Upon the whole of this case, I think myself bound to pronounce against this bond ; and I do so without meaning to affix any slur on the character of Mr. *Coates*, who has probably acted from no dishonest motive, but merely from a mistaken opinion of the nature of these instruments ; from which error, the owner himself appears to have been not altogether free ; for he seems at one particular time to have been willing to satisfy Mr. *Coates*’s demand against him by paying the money. This opinion, however, which he seems once to have entertained, he has since abandoned, and it certainly cannot be binding upon him, if the bond itself is not a legally valid instrument. I do not think that, upon sound legal principles, I should be justified in upholding the validity of this bond ; and I therefore pronounce against it.



## FRENCH GUIANA.

**I**N the month of *October* 1808, His Majesty's ship of war *Confiance*, Sir *James Lucas Yeo* commander, acting under the orders of Vice-Admiral Sir *William Sydney Smith*, arrived in the neighbourhood of the settlement of *French Guiana*, and soon afterwards Sir *James Yeo*, in conjunction with the *Portuguese* governor of the province of *Para*, formed the plan of an expedition for the reduction of the colony, then under the command of General *Victor Hughes*. After various operations, the conjoint *English* and *Portuguese* forces succeeded in obtaining possession of the territory, and, lastly, of the city of *Cayenne*, the capital of the colony, which surrendered by capitulation. Inventories were made of the public property, which, with the whole of the colony, was taken possession of by Lieutenant Colonel *Manexos*, the *Portuguese* commander, on behalf of the *Portuguese* government. After various difficulties, a final estimate of the public property which had been captured was made between Sir *James Lucas Yeo* and the Conde *De Funchal*, then *Portuguese* ambassador at the Court of *London*, at the sum of £107,251 6s.; and the proportion of it due to the *British* captors was concluded at £32,727 10s. This settlement was communicated to the *Portuguese* government, and an order for the payment of the money was made on the treasury at

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The Court of Admiralty has jurisdiction over the proceeds of prize or booty taken by a conjoint British and allied force, and brought within British territory.

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*Maranham.* *Bryan Broughton* the younger, of the house of *Broughton* and Co., was sent to the *Brazils*, for the purpose of receiving payment thereof, which was agreed to be made in five monthly instalments, four of which instalments were received and invested in the purchase of cotton, and consigned to *Charles Rivington Broughton* of *Parliament Street*, one of the partners in the house of *Broughton* and Co.

Some years elapsed from the time of the capture before any proceedings were instituted for condemnation of the proportion due to the *British* captors. This arose from some misconception that the sum paid was not in the nature of prize, but was to be considered rather as a gratuity from the *Portuguese* government to *Sir James Yeo* and his ship's company.

The property was however brought to adjudication in the High Court of Admiralty, by a proceeding instituted by the King's Proctor, on the 28th *November* 1815; and, on the 30th of *January* 1816, the Judge pronounced it to have belonged to the enemies of the crown of *Great Britain*, and condemned the proportion of the agreed value of it, amounting to £32,727 10s., "as good and lawful prize to our sovereign lord the king, taken at the colony of *French Guiana*, at the time of the surrender thereof to the conjoint forces of His Majesty and of his Royal Highness the Prince Regent of *Portugal*." A monition was at the same time decreed against *Mr. Broughton* and others, to bring in the money, or such part of it as had come to their possession. This monition was served upon *Mr. Charles Rivington Broughton*, and also upon  
Mr.

*Mr. Gottlieb Christian Ruperti*; and on the 8th of *March* an appearance was given for them, under protest against the jurisdiction of the Court.

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X In support of the protest, *Burnaby* and *Lushington* contended, that the money was not to be considered as *prize*, over which the Court could exercise any jurisdiction under the authority of the prize act, nor demandable as a matter of right from the *Portuguese* government, but was a mere bounty and donation from the Prince Regent of *Portugal* to the *British* officers and men, who assisted his troops in the conquest of *Guiana*. That the *Portuguese* government made this donation to the *British* troops, because the *British* government had made a similar donation, for services rendered at various captures made under Lord *Nelson*, to the Marquis *De Niza*\*, whose claim had been litigated in the court of common pleas and there rejected. That

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\* The Marquis *de Niza*, being a Rear-Admiral in the service of *Portugal*, and having a *Portuguese* squadron under his command, acted in conjunction with the *British* fleet under the command of the Earl *Saint Vincent* and Lord *Nelson* in the years 1798, 1799, and 1800, and was employed jointly with them in blockading *Malta*, *Leghorn*, &c. The right of the Marquis to a flag share in the prizes captured by the conjoint fleet, was much discussed before the court of common pleas, in the case of *Duckworth v. Tucker* (2 *Taunton*, 7.) ; but was not, under the circumstances, recognized by that court. The lords commissioners of the treasury having afterwards investigated the claim of the Marquis *De Niza*, considered that he had an equitable claim to compensation, and the sum of £12,864 13s. 10d. was granted to his representatives out of the proceeds of property condemned to the crown, but it was thought advisable to suspend the actual payment of this money, until the share of the *British* captors, in the prize or booty taken at *French Guiana*, had been accounted for.

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the *Portuguese* ambassador, when he signified the intention of his government to grant the money, expressly stated that it was not to be considered as prize money, but as a mere grant to the British officers, in the same manner as the money given to the Marquis *De Niza* was a free gift from the crown of *England*, and not prize money, and that the distribution was to be made in the same manner, and upon the precedent of the grant for the *Cape of Good Hope*. That the parties appearing under protest had already begun to distribute to the several officers and men, according to the scale of distribution sanctioned and directed by the *Portuguese* minister, with the consent of the persons interested, and not as prize agents nor under the regulations of the prize act. That they are not responsible to the prize court for the distribution of money placed in their hands, as private agents and trustees for the parties, nor liable to be called upon by monition, under the several acts of parliament passed for the regulation of prize agency. That the proceedings against this money as prize, and the sentence of condemnation were had without their knowledge and privity, and are altogether irregular and erroneous. That the whole territory of *French Guiana*, and every thing within it, became the possession of the crown of *Portugal*, and nothing but a *Portuguese* court could adjudicate upon the property; the acquisition being wholly *Portuguese*, the entire controul and management must likewise be *Portuguese*. That the circumstance of a small *British* force having acted in conjunction with the *Portuguese* troops, could not give jurisdiction to a *British* court. That it never could be maintained that a  
*British*

*British* prize court had jurisdiction whenever a *British* force happened to be assisting in a capture. That in many cases it could not enforce its sentence, and therefore could have no jurisdiction, since the rule was universal that a court of justice cannot entertain a cause without the power of enforcing its decree. That a *Portuguese* court could have had no power of enforcing its decree, and consequently no jurisdiction over the property in which the Conde *De Niza* claimed an interest, on the ground of having assisted the *British* fleets in capturing it from the enemy; and therefore a *British* court of justice had no right to interfere where *British* subjects had been assistant in a similar manner to the troops of *Portugal*. That great inconvenience must arise if the courts of any particular country could interfere, whenever any of its subjects, however few in number, joined the forces of an ally, and formed part of a conjoint expedition, which succeeded in making captures from the enemy. That none of the persons interested in the distribution of the property had in this case made the slightest complaint against the conduct of the trustees, and that the Crown, which could take no beneficial interest under the grant, and which had suffered so much time to elapse before it thought proper to interfere, was the only party now complaining. Upon these grounds they submitted that the judge was bound to pronounce for the protest, and to dismiss the parties.

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*The King's Advocate and Arnold contra.*

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### JUDGMENT.

Sir *William Scott*.—The question in this case arises upon the capture of *Guiana* by *Portuguese* and *British* forces in the year 1809. The Crown has instituted proceedings to call upon the parties, in whose possession the value of the proportionable share acquired by the *British* forces is, to bring it into the registry of the Court. This is resisted on the ground that the Court has no jurisdiction; the fact being (as it is asserted) that this money is not the proceeds of prize, but of liberality on the part of the *Portuguese* government, shewn in an act of mere bounty and donation. On the part of the Crown is exhibited a sentence of condemnation as prize, on which the Court is not disposed to lay much stress, if it passed (as it is said to have done) *sub silentio*, without any other than mere formal notice to those, who might have an interest in contesting it. On the other side is produced no act or deed of donation, nor any thing to show that this money was the spontaneous gift of the crown of *Portugal*. Governments are in the habit of recording many of their acts, and certainly not less those of bounty and beneficence than their other acts; but nothing of this sort is produced. The transaction passes informally, and its real nature is to be learnt, not from any forms that describe it, but from the course of events out of which it arises.

— The real objection to the jurisdiction of the Court arises upon the questionable nature of the interests which a *British* force jointly employed on the occasion of a capture, takes for the crown of *England* in that species of property, which, agreeably

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ably to the law of nations confirmed by adoption into the *British* laws, is considered as booty or prize of war. The question is, whether they took any original interest, or an interest derived merely from a subsequent grant of those, who acquired the territorial possession by the application of the joint forces. It may certainly be very material to consider this point of the *original right*, because if *such original right existed*, it makes it of little consequence what were the subsequent proceedings, unless they could be shewn to be founded on an express renunciation of the original right by parties capable of renouncing. A grant of that which was already acquired, and the acceptance of that grant would be merely formal and nugatory, and could not divest the antecedent title, which must be paramount to any such grant.

It may disencumber the question to consider, in the first place, who are in law the real proprietors of the species of property captured *jure belli* — and I have no hesitation in saying that the state is unquestionably so in all cases whatever. It may grant out the property to its captors, as our own government has lately been in the habit of doing by the revival of an ancient practice, and as some other states likewise do ; but this is not the case with all states ; some of them reserve the property for their own use and benefit, as it seems *Portugal* has done in the present instance. The original right is in all cases in the state. If two states join their forces for a common capture, one of which has granted out its interest to its captors, and the other has not ; the only effect is that the proportion of the value passes to the captor in one instance, and

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and remains to the state in the other, if that state chooses to assert its rights against the pretensions of its own captors.

The first question is, Is this a *common capture*, *common to both parties*? Or is it an *exclusive capture of one party*, to which the other lent either no real aid, or aid of so insignificant a kind as to pass for none in any legal effect that could be at all beneficial? Upon this question the material part of this controversy depends; particularly, if it be true that the original right when ascertained would throw all subsequent proceedings into a state of great comparative insignificance.

It becomes necessary to state the facts of this joint expedition, in order to ascertain its real nature, with reference to the relative interests of both parties, as arising out of it.

- ✓ It is stated, and not denied, that the expedition was planned by Sir *James Yeo*, and finally arranged
- by him with the governor of *Para*; that it was an expedition against the common enemy of both parties; that it was fairly to be considered as
- giving the authority of both states, expressed
- before-hand by the *Portuguese* government then in the neighbourhood, and subsequently confirmed by all the actings of the *British* government.
- *Ratihabitio mandato æquiparatur*. The expedition had precisely the same character as if it had been conducted under the immediate auspices of both governments. The proportion of force was nearly one-third *British* to two-thirds *Portuguese*, the *British* being 140 in number, and the *Portuguese* 480. Sir *James Yeo* the *British* commander was likewise the commander of the *Portuguese* naval force.



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force. This expedition, planned by the *British* officer, approved by both governments, is carried on to its ultimate effect by the forces of both. Supposing there had been no capitulation, but that the place had been taken by storm, could there have been a doubt that the *British* force would have been entitled to its proportion of booty so acquired for the crown? It was a result of a joint force, successfully applied to a capture. That the sovereign of the other party reserved his share to himself, would be no ground of the exclusion of the interest of the *British* crown or its grantees in this booty, so far as it was acquired by a *British* force. There can be no doubt that this Court would have adjudged as *due* to an ally in the war its proportion of the booty acquired under corresponding circumstances;—as *legally due*, not under the *prise act* certainly, but under the *general law of nations*. If taken by a joint force, this Court would have said, it belongs to both proportionably. It surely never could have said, it belongs exclusively to one, or it belongs to neither.

If this be true, then the only distinctions which would exclude the *British* claim, must be these; that the surrender was effected, not by storm, but by capitulation; that the intention from the beginning was, that the colony should be exclusively a *Portuguese* possession, and that the capitulation carried this into effect, by transferring the colony to the *Portuguese* only. To which, lastly, must be added as a corollary, that the possession of the colony carried with it to the owner of the colony all right of booty and prize of war.

Now

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Now the first ground can produce no such effect, for the capitulation itself is nothing more than the submission to the joint force. It is the joint force acting on the minds of the garrison, not immediately upon their persons, that compels the act of submission. It is stated in this very capitulation, that it is done to save the colony from total destruction. The joint force is acting up to the moment at which the capitulation takes place, and the capitulation is as much its effect as the throwing down of arms would have been upon a successful attack. Nothing can be more distinctly proved than this, from the terms of the capitulation itself. With whom was it made? Why the first name that occurs is that of the *British commander* by whom it was executed on the part of the captors. One of the signatures to the capitulation is *British*. In what language was it expressed? In *English* as well as in *Portuguese*. Every feature of a *British character* is preserved throughout, and is in no way merged in the *Portuguese* character. It must be admitted, that the colony was to become a *Portuguese* possession. Every reason concurred to render it advisable that it should be so; it could not well be held as a joint colony; *That* would on many accounts have been a highly incommodious arrangement. It could not well become a *British colony* on account of its great distance from all other *British* possessions; every local reason consigned it as a colony to *Portuguese* possession. All this was mere matter of agreement between the parties; but is it the effect of a conquest becoming a colony that it extinguishes the claim to booty or prize of war? Certainly the reverse; the right to booty  
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commences upon the surrender. If a capitulation protects all private and public property, the conquerors in that case take nothing but the colony, and if one of them is to have the colony, the other takes nothing but the glory of having contributed to the conquest; but if there be no such conditions, then all parties take not the colony merely under the capitulation, but also whatever is to be deemed booty by the laws of war. The dominion, in this instance, passed by private agreement to the *Portuguese*, but the right to booty taken from the common enemy of both countries, passed by the act of compelled submission to the whole of that force which compelled it. That this capitulation excludes booty, I do not find on the most accurate search, and indeed I should have been very much surprised if it had. The *French* could have no right to dictate terms respecting it, and it can hardly be supposed that the *Portuguese* would resist the claims of the *British* force for the usual remunerations of war, when they owed in so considerable a degree the acquisition of a colony to their friendly exertions. Accordingly all contemporary acts shew the understanding of the parties upon this point. Inventories are carefully made of all the articles that compose what is specifically liable to be considered as booty of war, and this while the colony is in the joint possession of both parties. The demand is made by the *British* and admitted by the *Portuguese*, into whose exclusive possession the colony was afterwards delivered. There is nothing therefore in the capitulation, or in the acts that immediately followed that imply a renun-

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ciation of *British* claims, and therefore if they existed before, they stand unextinguished.

But it is said, that there are some circumstances that extinguish it, and first, "that this is money." But surely it is not the less *prize* upon that account; for suppose that the place had been surrendered to a single *British* force, and the captors had agreed to accept a sum of money as the supposed value of the articles, would that sum of money be less *prize* than the articles themselves? I take it to be the usual mode of arranging matters of this sort. It is not the practice to take the guns and dismantle the forts, or to take the stores and render the colony useless, and to bring all these into *British* ports, there to be proceeded against as prize. Such a course of proceeding would be monstrous and impracticable; but the captor takes the estimated value. The condemnation goes in — all cases against the goods (as it does in this case), but what the captors take, in ninety-nine cases out of a hundred, is the estimated value. Any other mode of transacting the business would, in most cases, militate both against the public and private interests of the nation.

+ It is said, in the next place, that this property ought to have been legally proceeded against in the *Portuguese* tribunals. A mere majority of force would produce no such obligation as that, for suppose that a small *British* vessel in conjunction with a larger *Portuguese* ship, should capture a prize at sea and bring it into a port of this country, the majority of the *Portuguese* interest surely could not exclude the jurisdiction of this Court,

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Court, and render it necessary that the proceedings should be in some *Portuguese* court of prize. If a majority of interest would not exclude, then there would be nothing left but the circumstance that the colony does *now* belong to the *Portuguese*. Would *that* produce it? Undoubtedly it would on all questions merely colonial; but if here are *British* interests to be decided upon, what is to exclude the *British* jurisdiction? It is acting only upon *British* interests, and what right have the *Portuguese* to quarrel with that? But *do* they quarrel at all with it? Is it *their* protest that we are discussing? There is no reclamation whatever on their part. Here is the estimated value of the goods as admitted by them in this country, and in the hands of *British* subjects, consequently within the reach of this Court, and not at all within the reach of any court of *theirs*. That the *Portuguese* tribunals might have condemned to the *British*, if they had thought fit, it is not denied; but *they* are silent about it judicially. No proceedings of that nature are instituted *there*. What is there then that bars the enquiry *here*?

It is said that it would be a monstrous inconvenience if the court were to entertain *British* claims in all cases in which the slightest assistance has been rendered by *British* subjects; and so it might, if the court were to interfere on all trifling occasions; but has the crown of *England* no discretion to exercise in such matters? Has this court no prudence to discourage suits about mere trifles. "*De minimis non curat lex*." The law will discourage such attempts, and the parties making them would be recommended to try other modes of applica-  
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tion. The remedy might otherwise be worse than the disease: But is that the case here? The mere proceeding to a condemnation as prize is a matter of trifling expence. All the expence here is created by the resistance to the proceeding. And what is the value of the property in question? It is to the amount of 32,000*l.* and in which not fewer than 141 *British* subjects assert themselves to be interested.

It is said that the court could not proceed to adjudicate upon it, if the property happened to be in another kingdom, as in *Portugal* for instance. It is a sufficient answer to that to say that *here it is*, and therefore clearly within the jurisdiction of a *British* court. It will be time enough for the court to consider what its duty may be, when the fact of the objection happens to exist. The crown did not commence its proceedings until a late period; and the probable reason for the delay was, that the property had not long arrived. It is said also that — this is not within the prize act; and most unquestionably it is not. All that the prize act does, is to give the right to the captors in conjoint expeditions; but the right existed in the crown before, and independently of the prize act, or it could not have given it by the prize act.

So much for the general and original nature of this case. Has this been altered by any thing that has subsequently taken place? A demand it appears was made by Lord *Strangford*, the *English* ambassador at the court of *Braxils* on the 22d *October* 1810, but whether any application for the money was made or not before that time, *non constat*. At any rate, there appears to have been

some delay; but it is equally a delay, whether payment was expected as a gratuity or as a debt; for, in either point, it must be equally desirable to get the money into possession; and, if it could be obtained merely as a favor, there was then a still more cogent reason for an immediate application, whilst the sense of the service was warm, than if it was a debt which could be enforced at any time that convenience might dictate. It is impossible to read these letters, without coming to the conclusion, that it was considered as a claim *of right*. The whole tenor of the letters, and every expression in them, shows that the *Portuguese* government thought itself bound in justice to do what the *British* government would have done; and not have withheld liberality, but defrauded justice, if they had not. There was no dispute whatever about the right. Nothing but the quantum of it was to be ascertained; and the very instance of the *Gabrielle* shows with what scrupulous adherence the *Portuguese* government acted upon every principle of *British* law, one way as well as the other. Not a word was then said of the *British* grant to *M. De Niza*, as influencing their practice; nor could it, as it did not exist at the time; and therefore, if at any subsequent time it was assumed as a motive, it is demonstrated to be an after-thought founded in error, as indeed it would have been so founded, if it had existed at the time, the facts being so totally different as to be entirely inapplicable; the *Conde de Niza* having lost his legal right to his share, by stumbling into the court of common pleas, instead of resorting to the court of admiralty; and the money having, in consequence,

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already travelled elsewhere. It is true that the government afterwards paid the money out of its own funds, and in tenderness to a foreigner made up what he lost by his ignorance of our law. In this case, the estimated value is forthcoming and unapplied in any other way, and admitted to be payable to these parties.

Such is the transaction, and the view which was taken of it for more than four years. The first suggestion to the contrary is an opinion expressed by Sir *James Yeo*, in the month of *June* 1815, on a question respecting the right of *Greenwich Hospital* to partake, and which he, probably, was not much disposed to favor. He says, that the right of the hospital depends upon the question whether *prize or no prize*, and very properly adds, *that is a question to be decided by the law officers*. He, therefore, himself claims but small respect to any opinion which he might venture to give upon such a question, and certainly, the opinion which he does hazard, is entitled to little beyond what is due to merits of a very different kind, which are universally acknowledged to belong to that eminent person. For it denies the property to be prize, merely because the *Portuguese* government do not bestow money for any prizes taken in *their* service. But I must repeat that this is not money bestowed by the *Portuguese* government; it is money acquired for the crown of *England* by *British* forces. If the property taken remained in *Portuguese* possession, it was only because it would have been inconvenient to have had it then removed, but it was afterwards to be removed in a form and at a time most convenient to



to all parties. That the *Portuguese* government kept its share of booty to itself is surely no reason why the *British* government should not have its share, or having received it, why it should not dispose of it in any manner it may think fit.

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The next documents, to which I shall refer, and which are dated in the same year, are the letters of the *Conde da Funchal*, in which his excellency hazards his opinion to the same effect, and upon premises equally unsound, upon a parallel between the case of *De Niza* and this,—cases which by no logical or legal reasoning can be brought within any practicable distance of each other.

But his reasoning, if ever so close and conclusive, is not addressed to the *British* government. It is a letter addressed to private individuals, and whatever may be the nature of its contents, can never be binding on the *British* government. Here is a pretension, not founded on the authority of his government, communicating his own incorrect reasoning to private persons. It is impossible to say that such letters can be taken as stipulations or agreements, or any joint description of the matter given by the two governments. I violate no respect, when I say that it is a mere private opinion upon a question of law, on which his opinion would weigh but little, even if it was less discredited by the reasons adduced to support it. At the same time, I recur to the opinion I before expressed, that if the *British* crown had an original right, which it never abdicated by its own authority, the mere opinion of the *Portuguese* government certainly could not dislodge it; for what would that be but the opinion of  
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the adverse party on a question of right between them and the *British* government. And if on all true principles of the law of nations, the one had such a right, it could not be affected by the strongest proof that the other viewed it in a different light.

The document which I shall next notice is an official note of the *Conde da Frenchat's*, dated the 15th of *February* 1813, in which he informs the *Portuguese* secretary of state, that "the method of distribution having varied, they took, as the best precedent, what was done at the *Cape of Good Hope*." It is perfectly clear, I think, that *distribution* must here mean *division* between the *English* and the *Portuguese* forces, for that covered the only question with the *Portuguese*. To *them* it must be matter of little consequence what was to be the distribution made of the *British* share amongst the *British* forces. But it *was* of importance what share the *Portuguese* government was to retain, either for itself or its forces, upon the division. It is in pursuance of this view, that the very next sentence in the letter points directly to it. The *English* commander and the *Portuguese* commander are classed together, and the subordinate ranks of both in like manner; and that is all that is done, in order to find out the proportionable allotments to the two allied services, but not a word is said about the *internal division*. The proposed division, according to the *Cape*, did not in fact, take place between the two services; but if it had, still it would not have reached the internal divisions amongst the *British*. That was for *British* authorities to direct exclusively.

Until

Until a very late period then (as far as appears by the present evidence) such was the consideration of this matter :—a claim on one side, acceded to on the other. No pretensions on one side to the merit of generosity ; on the other, no expressions of gratitude for acts of mere liberality. All that is claimed, all that is admitted, is the merit of simple justice ; no act of donation produced, no act of acceptance on such a ground. Upon all the consideration which I can give to the arguments which have been ably urged on both sides of this question, I am of opinion, that I am bound to regard this money as prize of war; and not as *Portuguese* bounty ; prize to the crown of *England*, however it may please to dispose of it. I think I should act against the just rights of the *British* crown, if I was to declare that it was entitled to nothing upon a capture from the enemy, effected in no inconsiderable degree by its forces, but what it could obtain from the mere bounty of its associate in arms. Is there any principle of the law of nations, which says, that to vest a right in the spoils of war, the conquest must be effected by a sole force ? If so, what right have the *Portuguese* to claim any thing, for it was not their sole force ? If there be no such principle, and it once vests in a joint force, where does the right of a joint force cease ? Under what disparity of numbers ? The disparity may be such as to make the right hardly worth the trouble and expence of a legal reclamation of it. But it exists in such cases in contemplation of the law ; and injustice, more or less, is committed, whenever it is withheld in any proportion. In the present case, it has a respectable magni-

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magnitude and is completely tangible by the proper courts of this kingdom. The *Portuguese* government admits the claim, and the *Portuguese* courts assert no exclusive cognizance, or indeed any cognizance. What is there then, that stands in the way of a *British* adjudication? I profess that I can see nothing that does, and therefore I shall pronounce for the jurisdiction of the Court.

Having decided for the jurisdiction of the Court, the remaining question is, how it is to be exercised? The prayer of the crown is, that the money admitted to be in the hands of the parties may be brought into Court. The holders are gentlemen, who describe themselves as *private agents*, not as *prize agents*, of Sir *James Yeo* and others. It is said that they could not be *prize agents*, because they never considered the money as *prize*, and, of course, never qualified themselves as prize agents, nor are they liable to any of the restrictions imposed on prize agents by statute. In other passages they are described as *trustees* for the distribution, according to the condition of the agreement of the *Portuguese* government with our own government, which agreement or conditions are not exhibited, nor is there any proof that they ever existed in any producible form, or contained any such conditions. The present proceeding on the part of government is decisive, that it acknowledged no such agreement or conditions, or it would not have made such an attempt to break in upon such a trust, so stipulated for and confirmed. When it calls upon them to bring in the proceeds of prize belonging to itself, its prayer is in direct contradiction to all that is averred respecting the understanding of the *British* govern-

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government, that this money was the King of Portugal's, and not prize. In what way can the Court justify a non-compliance with this prayer? If it be the property of the crown, and the crown desires to have it deposited in the registry, this Court has no choice; all that I can do, is to allow a reasonable time for the performance of what I am bound to direct shall be done; and there having been mistakes of long standing about the nature of this property, and advances of money under the influence of those mistakes, I could wish to allow as much time as can fairly be requested for the convenience of the parties; and as there is reason to presume that the whole may pass to the captors by royal grace, I shall not compel the sums, that have been already advanced by the agents to some of the captors to be brought in, provided such sums do not exceed what the amount of the shares of the parties, to whom the advances have been made would have amounted to under the prize proclamation then existing; but I shall expect an exact account upon oath of the advances that have been made. The rest of the money must be brought into the registry, but I shall not at present specify any precise time within which it must be done.

## URANIE, MORGOTTÈ.

April 22d,  
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Head-money is due for an enemy's ship of war set on fire by her own crew in consequence of the approach of a *British* force and totally destroyed.

THIS was a motion, calling upon the Court to pronounce head-money to be due to His Majesty's ships *Apollo* and *Havannah*, for this *French* frigate, which was destroyed by fire in the harbour of *Brindisi*. On the 31st of *January* 1814, the *Apollo* arrived off *Brindisi* in pursuit of the *Uranie*, which had been chased from *Ancona*, and there found His Majesty's frigate *Havannah* blockading the port into which the *French* frigate had run. On the third of *February* following, it was agreed between the commanders of His Majesty's two frigates to proceed into the harbour for the purpose of bringing the *Uranie* out or destroying her, and when they had got within about two miles, it was discovered that the crew were disembarking, and that a great smoke was issuing from her main hatchway, which soon burst into a flame, and she was totally destroyed. An affidavit of the purser of the *Apollo* was exhibited, with a certificate annexed, signed by M. *Morgottè*, the commander of the *French* frigate, from which it appeared, that there were 307 men on board, previous to her being set on fire.

The King's Advocate, in moving the Court to pronounce for the head-money, observed that it was clear the ship was set on fire by the *French* crew, solely in consequence of the approach and the expected attack of the *British* frigates. He adverted to the case of the *Elise* (vol. 1. p. 442),  
in

in which the Court had refused head-money for a vessel driven on shore by a *British* ship of war, and set on fire, from which she sustained so much injury that the enemy (as it was sworn to have been afterwards ascertained), were under the necessity of breaking her up ; and he observed that the present case was distinguishable from that, as in this there was a total destruction of the property by the fire, and consequently a total loss of the frigate to the enemy ; whereas in the case of the *Elise*, the vessel was not totally destroyed, nor did the enemy sustain a total loss.

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The Court thought the distinction important, and pronounced in favor of the claim.

## VILLE DE VARSOVIE AND OTHERS.

May 13th,  
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This Court will not reject as inadmissible the evidence of a person convicted of a conspiracy to defraud, in the absence of any actual decision to that effect in the courts of common law.

THIS was a question respecting the admissibility of an affidavit made by Lord *Cochrane*, which was objected to, on the ground of his lordship's alleged incompetency to give evidence in any court of justice, by reason of his having been convicted of a conspiracy to defraud. The cause, out of which it arose, was a proceeding to enquire who were the parties entitled in distribution to the bounty or head-money due for the destruction of certain *French* vessels of war in *Air Roads*, in the month of *April* 1809. It commenced by a motion issued at the instance of the agent for the fleet under the command of Lord *Gambier*, against the agent for Lord *Cochrane*, late commander of His Majesty's frigate *Imperieuse*, calling upon him to shew cause why the head-money should not be distributed to the commanders, officers, and crews of all the ships composing Lord *Gambier's* fleet. An appearance was given for Lord *Cochrane* by his proctor; and an act on petition was entered into, setting forth the circumstances upon which the claims of the parties were respectively founded. Application was afterwards made to the Court, on behalf of Lord *Cochrane*, for permission to correct certain errors which were stated to have crept into the act on petition, but the Court refused to grant this indulgence, unless some satisfactory explanation should be offered with respect to the manner in which the errors had arisen. For this purpose,

two



two affidavits, one of them made by a person who had been professionally engaged in the conduct of the cause, and the other by Lord *Cochrane* himself, were offered to the Court. An objection was taken by the King's Advocate to the admission of this latter affidavit, on the ground of Lord *Cochrane*'s incompetency to have his testimony received. The King's Proctor, then exhibited an official copy of the record of the conviction of Lord *Cochrane*, in the Court of King's Bench, for a conspiracy, together with an affidavit of the identity of the person so convicted, as being the party in this suit. The indictment on which his lordship was convicted, charged in substance that he had designedly, unlawfully, and fraudulently conspired with certain other persons therein named, to circulate false intelligence for the purpose of occasioning a temporary rise in the public funds, and thereby to defraud the king's subjects. The fourth count charged him with having fraudulently, &c. conspired to cause a letter to be sent to Sir *Thomas Foley*, the commander of His Majesty's ships on the *Downs* station, with a wicked intention to impose upon him, and to induce him to communicate the false matters contained in the letter to the Lords of the Admiralty, and through them to the public. There were other counts charging the same fraud, but varying the description as to the modes of executing it. There was also produced the verdict of the jury, finding Lord *Cochrane* guilty upon the several counts of the indictment, with the exception of the first and second, and the judgment of the court, sentencing him to pay a fine of £1000 to the

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the king, to stand in the pillory, and to suffer three months imprisonment.

The King's Advocate observed, that there was no principle in general jurisprudence more familiar to the practice of courts of justice than that of persons being incapacitated in certain cases from giving their testimony. Sometimes the ground of exception was affinity to the parties interested; at other times personal interest in the question pending; and at others, as in the present instance, a want of that credit without which a court of justice could not proceed to a decision upon grounds satisfactory to its own judicial conscience. He cited a variety of authorities, to shew that a conviction for a conspiracy of the nature of that of which Lord *Cochrane* had been convicted at the prosecution of the king, was to be considered as an absolute ground of disqualification; and referred to decided cases, in which he contended that evidence had been repelled upon the ground he was now contending for, that the infamy of the crime was the ground of the disqualification, and that every species of the *crimen falsi*, of which that in the present instance was one, was of this infamous nature. This doctrine, he observed, had been particularly laid down by Mr. Justice *Buller*, who expressly stated such a consequence to be attached to the crime of barratry, and had described conspiracy as being a crime of a blacker die than that of barratry. 1 *Hale*, 306.—2 *Hale*, 277.—*Gilbert's Law of Evidence*, 139. 142.—*Co. Litt.* s. 1. 6.—*Peake*, 85.—*Eden*, P. L., 61.—2 *Hawk.* 609.—*Kely.* 33. 37.—2 *Buls.*, 154.—*Raymond*,

*Raymond*, 32.—*Salkeld*, 689.—2 *Wilson*, 18.—*Skyn.* 578.—5 *Mod.* 15. 76.—*Leach's Cases in Crown Law*, 442.

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*Adams* followed on the same side.

*Lushington*, in reply to the objection taken, observed, that if he understood the objection correctly, it went to the utter disqualification of Lord *Cochrane* as a witness for ever and in all causes. The ground of objection was one which so seldom occurred in these courts, that he felt himself under a difficulty in arguing the case, which he should not have felt in cases more within the scope of his daily experience and practice. The question was, whether the conviction had rendered Lord *Cochrane* infamous or not; whether it had made him incompetent even to give an affidavit. If the objection should be held valid, it would in the shape, which the case had assumed, deprive Lord *Cochrane* of all evidence whatever, and that under very particular circumstances. It was not doubted that Lord *Cochrane* was an actual captor, nor that the principal brunt of the action, and the hazard attendant upon the capture, had been borne by his lordship. The ordinary course in such cases was for those who set up an alleged claim to share, upon which any dispute should arise, to be put to establish that claim by legal evidence; upon them was the *onus probandi*. In the present case this usual course had been varied, the agent for the Fleet and the King's Proctor having adopted a different course of proceeding. Instead of the question coming on by allegation, where strictly legal evidence only could be produced, where all testi-

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mony of persons interested must have been rejected, it came on by act on petition, where the litigant parties had no power of compelling the production of any testimony whatever, and that which was to be used in the cause came from the suitors themselves. In equity such an objection as the present was peculiarly to be discountenanced, and still more so, when the subject matter of the suit and the parties litigant were considered. Those who now claimed to be sharers with Lord *Cochrane* were brother officers of his lordship, and they sought to obtain an advantage to themselves by excluding the testimony of him whose conspicuous gallantry, admitted by themselves, and known to all the world, had given the reward itself (which was the subject of the suit) existence. Such an objection might have been taken in the Court of King's Bench, or the Court of Chancery, in both of which Lord *Cochrane* had suits; or in the House of Commons, of which he was a member; but it had not been so. It had been reserved to be taken by his brother officers in this court, and under these peculiar circumstances. Undoubtedly they had in law a right to take it, if they thought proper; and for the exercise of that right, they could only be accountable to their own consciences, and the tribunal of public opinion. He then proceeded to contend, that objections to competency were to be construed strictly: the leaning of courts was against sustaining or extending them: they were generally described as odious, and if they were so to be considered in ordinary cases, they were more especially so in this. He then

then remarked, that he must take the conviction as true, however the facts on which it was founded might have been doubted ; and though a difference of opinion had existed upon it in parliament, and Lord *Cochrane* had been deprived of the benefit of a new trial by a technical rule of the Court of King's Bench. The question then was, whether, in consequence of the conviction produced, Lord *Cochrane* was rendered for ever incompetent to give his testimony in a court of justice. The conviction was for a conspiracy ; but did every conviction for a conspiracy render the person convicted infamous ? It was not alleged that universally a conviction would have such an effect, but only that a conviction at the suit of the king would. Sir *M. Hale*, vol. ii. p. 277., said " On attain of a conspiracy at the suit of the crown, the defendant is to have a villainous judgment and *amittere liberam legem* : but otherwise, if he be only attainted at the suit of the party." The villainous judgment was therefore the basis of the incompetency ; and if the villainous judgment were not in law a necessary consequence of the conviction for conspiracy, the reason, upon which the incompetency was founded, entirely failed. The villainous judgment in fact only followed a particular species of that crime which is now generally termed conspiracy ; for conspiracy in former times was not the offence to which that term is now generally applied. He then referred to the statute of *Edward I.* as first defining the offence of conspiracy, and to *Coke's Institutes*, p. 141, and *Co. Litt.* 6., where, as he remarked, Lord *Coke*, who had used the term conspiracy as inducing conspiracy, had himself explained the conspiracy he meant, as

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being not what is now termed a conspiracy, but a conspiracy maliciously to indict a person of felony. When, therefore, he spoke of incompetency following from a conviction for conspiracy, it must be taken that he spoke of a conspiracy to indict for capital felony. Mr. Sergeant *Hawkins*, (vol. ii. book 1. c. 72. sect. 9.), speaking of conspiracy, had said that the villainous judgment should follow a conviction upon a conspiracy to indict for capital felony: but whether in any other case or not, he said, he did not find it settled. If then the law remained thus, the Court would hardly hold that incompetency followed in a case where the very basis of the principle was doubted; and more especially as, since the time of *Edward I.*, no such judgment had been given in any case; and also because it was manifest that Lord *Coke*, to whom both *Hawkins* and *Hale* appealed as authority, was speaking of a particular species of conspiracy. The point, however, was not left in the doubt which *Hawkins* supposed; for there was the authority of Lord *Holt*, in the case of *Saville v. Roberts*, (12 Modern Reports, p. 209,) subsequently confirmed by Lord *Raymond*, expressly on the point that the villainous judgment did not attach, but upon the conspiracy to indict for felony. It was not necessary to trace this point farther, for these were the greatest authorities in the criminal law, and all subsequent writers had only copied from them. It therefore followed, that when it was said that a conviction for a conspiracy at the suit of the king rendered incompetent, because the villainous judgment followed, a conviction for any other conspiracy at the suit of the king would not render incompetent,

tent, because the villainous judgment, the reason for the incompetency in the former case, would not attach. The dreadful extent to which a contrary doctrine would go was no light argument against it. If Lord *Holt* were not correct, the villainous judgment might be pronounced upon all artificers convicted of a conspiracy to raise their wages, upon persons conspiring to poach, to break down fences, or to publish a libel; for, according to the law of conspiracy as now understood, persons conspiring to do any unlawful act, commit the crime of conspiracy. What such a judgment was, might be seen in Lord *Coke*; and the inconvenience of rendering so numerous a class of persons utterly incompetent, was apparent. If any conspiracy was sufficient to render all convicted of it infamous, the statutes (2 & 3 *Edw.* 6. ch. 15.) by which artificers who do conspire are only rendered infamous for the third offence, receiving a milder punishment for the two first, would be an abatement of the punishment, instead of a vindicatory statute. There was no legal authority for a conviction upon any other conspiracy (than such as he had described) rendering incompetent; and it would therefore be quite sufficient to say, that the objection was not supported, for those who allege the objection were bound to show the law upon which it rested. There were, however, very many legal decisions, as well as strong grounds, by which to prove the negative, *viz.*; that a conviction for any other conspiracy does not render incompetent. Lord *Cochrane* had been convicted of a conspiracy, and nothing else. He had not been convicted of having done any thing, but of

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conspiring to injure and aggrieve, &c. He had not been convicted of the act itself, but of conspiring to do the act; and the conviction for a conspiracy to do such an act was not shown to have ever rendered any one incompetent. If then Lord *Cochrane* was not rendered incompetent by reason of a conviction for such a conspiracy at the suit of the King, the next question was, whether he was incompetent in consequence of the conviction abstractedly. The judgment being to undergo the pillory, would not *per se* be attended with any such consequence; for it was now decided, that a man may have judgment of the pillory, and actually undergo it, without being thereby rendered incompetent, as in the case of a libel on government. The law on these questions had been subjected to great variations. At one time it was held that a judgment of pillory, and actually suffering it, would render the person convicted ever after incompetent. The law was then changed, and it was held that the judgment of pillory did not disqualify, but that the nature of the offence and not the judgment was to be considered. As to the nature of the offence, it had never been defined with any accuracy, what was an infamous offence, or what the *crimen falsi*. He instanced certain convictions for forgery, for conspiracies to accuse of felony, or to commit other crimes, libels against government, trespasses, riots, and other offences, which did not disqualify; and contended, that in the major part of these offences, the *crimen falsi* must either exist of necessity, or in all probability. The distinctions therefore, as to what was the *crimen falsi*, or not, were exceedingly minute and delicate; and courts



should pause before they pronounced for any incompetency, except under the authority of decided cases. He then adverted to the nature of the offence of which Lord *Cochrane* had been acquitted, and that of which he had been convicted; and contended that there was nothing in the latter offence peculiarly to be denominated the *crimen falsi*; and farther, that Lord *Cochrane*'s conviction was not of having committed it, but only of having conspired to do so. He then alluded to the nature of the punishment, and contended that all felons were incapacitated only during the existence of the punishment; as even in cases of felony the parties were restored to credit after having suffered the penalty of their offence; and it would be extraordinary if a conspiracy to commit an offence should be visited with a greater punishment than the commission of the offence itself; that in the one case the incompetency should last *in perpetuum*, and in the other be limited to the duration of the punishment. Lord *Cochrane* had suffered his punishment; and had his offence been greater than felony, which only disqualified during the punishment? He then adverted to the remission of the punishment of the pillory, and expressed a wish to lay before the Court an official copy of the king's pardon. He went on to examine several of the cases referred to, and concluded by submitting, that neither upon them, nor upon the authorities referred to on the other side, could the objection taken be supported.

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### JUDGMENT.

Sir *William Scott*.—This is a suit arising upon the capture and destruction of the *French* vessels of war in *Basque Roads* in the year 1809. And the question to be determined is, who are the persons to whom the head-money granted by act of parliament is due, whether to the actual captors, or to the fleet generally in conjunction with them. It commenced with a monition from the fleet, calling upon Lord *Cochrane*, the actual captor, to shew cause why the fleet should not be admitted to share in the head-money, which is, in the decisions of this Court, considered as more immediately belonging to the actual captors than prize is, but which the fleet asserted themselves to be, as well as the ships under the immediate command of Lord *Cochrane*. His answer to the monition to shew cause, was by entering into an act on petition (as it is technically called); a summary mode of proceeding, in which the parties state their respective cases briefly, and support their statements by affidavit;—a form convenient enough in matters of slight interests and not of very delicate investigation, but certainly not adapted to a case like this, where the important facts of the case are themselves minute, and therefore unfit to be left to the laxity of affidavits, and in which the examination of unwilling witnesses cannot be enforced by the authority of the Court. There seems to have been no reason why Lord *Cochrane* might not have given an allegation, stating that the ships under his command were the actual captors, and denying the right of the other ships to be considered in that capacity: the *onus probandi*

*bandi* might then have been thrown on the other side, witnesses have been compelled to give their evidence, and answers upon oath extorted from the other parties. No reason is assigned why all this has not been done. It has been thought proper to pursue another course; an act on petition has been entered into, and affidavits adduced in support of it, amongst others, one from Lord *Cochrane* himself, which has been objected to on the ground of his incompetency to give evidence in any court of justice, in consequence of his having been convicted in the Court of King's Bench of a conspiracy to defraud, and having been sentenced to stand in the pillory.

This objection must be considered on the authorities of the law of *England*. The question, it is true, arises in a cause and likewise in a court which are both governed by another system, but it arises incidentally in a case that concerns *British* subjects only, on a mere dispute of property between them, and if determined, in one manner deeply affecting the civil condition and capacity of one of them. Upon all these considerations, it is the duty of the Court to look only to the law of *England* as its proper guide, although it does not administer that law generally, and therefore does not profess to understand it otherwise than by the information it collects *pro re natâ*, and with the diffidence that naturally belongs to partial views and an imperfect knowledge of the general system. Principles respecting the competency of witnesses are, however, common to all systems. The civil law, in which the nature of testimony has been the object of peculiar attention, is the undoubted source of many rules

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rules to be found in most modern systems of jurisprudence, in our own as well as in others. It is one rule that the testimony of those who are *damnati publico judicio* is inadmissible. If a man is stigmatized by public fame only, and not by censure of law, it affects the credit of his testimony, but not his admission to the formal character of a witness. It is another rule, that the *publicum judicium* must be upon an offence implying such a dereliction of moral principle, as carries with it a conclusion of a total disregard to the obligation of an oath. Crimes of the graver kind, which render a man unfit even to be permitted to live in the same country in which he has committed them, render him unworthy of belief in a court of justice. In lighter offences the incapacity stands on a footing of a more positive nature, founded certainly in principle, upon a moral consideration, but discriminated upon gradations marked and distinctions taken by law in the exercise of a sound discretion, and recognized by the authorities of accredited text writers, and the actual decisions of the higher courts of justice. It is almost unnecessary to add that it will be the duty of this Court to keep within the exact pale of such authorities, to go full as far as they have travelled, but no farther. The courts which have a direct jurisdiction on such subjects, may with great propriety, and under irresistible calls of public duty, carry them further upon principles of just analogy; but this Court, which touches such a question only incidentally, has a more confined province. It must not place itself in the unseemly situation of carrying the penal law of *England* (for such is the nature of  
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of the present question) one hair's breadth further than the common law of *England* can be shewn to have already carried it. It is then a question of fact, how far it has been actually carried.

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In tracing the history of this subject, it clearly appears that for a long time the incompetency was supposed to result rather from the mode of punishment than from the nature of the offence. To some modes of punishment infamy appears to have been technically attached, and that infamy carried along with it the incompetency of the person who had suffered it. Accordingly, Lord *Coke* lays down without reserve, that if a person hath stood in a tumbril, or been branded, or hath lost his ears (no matter it should seem for what), he is incompetent. This doctrine gave way but slowly, and certainly upon a hesitating consideration. In the case of *Davis v. Carter*, (5 Mod. Rep.) *Holt* is reported to have said, if a man stands in a pillory, he cannot be a witness; but if he be convicted for a libel, and has stood the pillory for it, yet perhaps he may be a witness. In *Fortescue* a stronger view of the subject is taken (in 1695), *Rex v. Crosby*, 2 *Salkeld*, 689. in 1695. It appears to have shifted from the punishment, but no further back than to the judgment; for *Holt* lays it down there, 1st, that the disability flows from the infamous judgment, and not from the nature of the crime; for if a man be convicted for a cheat, and adjudged to stand in the pillory, he cannot be a witness; otherwise, if not adjudged to stand in the pillory. The law did not remain long on this footing, which certainly could not be considered as a commodious one, that the disability

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ability should arise not from the nature of the crime nor from the mode of the punishment, but from the judgment, which merely prescribes the mode of punishment. Still, however, the more ancient opinion appears to have lingered in the courts ; for though it is laid down by the Court in the case of *Rex v. Ford*, that it is not the nature of the punishment but the nature of the crime and the conviction that creates the infamy (anno 1700), yet the doctrine does not appear at that time to have been finally and fully settled, nor was it so settled until after three arguments at bar (2 *Wilson*, 18.) in the year 1755. It then proceeds to speak in strong and not very measured terms of reprobation against the doctrine which had originally possession of the courts, that it is absurd and ridiculous to say, that it is the punishment of the pillory and not the nature of the crime, which renders persons incapable to give testimony in a court of justice.

It now appears to be finally settled by Mr. Justice *Buller*, (*Leach's Crown Law*, 442.) that the infamy arises, not from the punishment nor from the judgment, but from the nature of the crime. The question recurs to what offences has the law attached the disability besides those higher offences which are visited with the heaviest punishments that man can inflict on man. It is laid down very generally, that all crimes comprehended under the *crimen falsi* subject the guilty parties to this disability. It is so laid down by *Gilbert* in his treatise upon the Law of Evidence, by *Leach*, by *Peake* and by *Phillips*, and in short by all the approved text authorities.

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ties. The first step, therefore, is to ascertain what is the *crimen falsi*: The term itself is borrowed from the civil law, and is much the subject of the *Lex Cornelia de falsis*, and the numerous commentaries upon that law. I have in vain endeavoured to find a satisfactory definition of this term in those books. It seems to have been particularly pointed to the offence of forgery, as I observe it is likewise by Mr. Justice *Blackstone* (vol. iv. 247.) “*forgery or the crimen falsi* ;” as if it were rather the technical description of that particular offence than a general description, including a class of offences. But it appears to have been extended to other offences, though I meet with no precise definition that includes all the offences comprehended under it, and them only. It was perhaps, more convenient to leave such a matter to the known wisdom and integrity of the tribunals acting upon the particular occasion as it occurred, than to shut it up within the limits of any exact definition of the word *falsi*; for, I presume, it would be as inconvenient to say, that every judgment upon a falsehood, however slight and unimportant in its injurious effects, would subject the convicted party to this disability, as it would be to say, that there are no crimes coming under the description of *falsi*, that ought to subject to such an incapacity. My limited acquaintance with the authorities of the common law, has equally failed in furnishing me either with a definition of the crime, or a plenary enumeration of the species that are comprehended under it.

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Mr. Justice *Blackstone* lays it down thus, a conviction of any offence comprehended under the denomination of *crimen falsi*; but this leaves it still at large what offences are so comprehended; and the general term, as I have observed, leads to no distinct inclusive and exclusive specification. Lord Chief Baron *Gilbert* lays it down repeatedly thus, (141. 143.) every *crimen falsi*, such as forgery, perjury, and the like, but without laying down as a guide to my judgment what degree of *likeness* is required, and where it ought to end, and becomes extinct. Mr. *Peake* (35) states it thus, every species of the *crimen falsi*, such as perjury, conspiracy, &c. Mr. *Phillips* (p. 15.), no incompetency from the punishment, unless *pro crimine falsi*, such as perjury, &c. Here is a large *hiatus* under these *et ceteras* and *the likes*, and I should find great difficulty in filling it, except under the guidance of determined cases.

Some text authorities certainly mention conspiracy among the grounds of incapacity; but surely, not every conspiracy in the unlimited sense of the word; though Lord *Coke*, in the passage referred to, uses it without any adjunct of limitation. The word conspiracy standing here, has been argued, with a considerable shew of authority, to have a technical meaning, now obsolete, and that meaning defined by a statute enacted for that purpose (*Ed. 1.*), and it does at that time appear to have had that particular meaning; a meaning arising out of the manners of the times, when men of wealth collected numbers together, for the purpose of oppressing others. In that sense, it  
travels



travels well in a course of legal guilt along with barratry (which stands in the catalogue with it); the one being an oppression by force of arms, the other under a color of law. In another passage, Lord *Coke* qualifies the conspiracy, by annexing to it, that it must be a conspiracy *at the suit of the crown*. It requires more information than I possess to be able to distinguish what is a conspiracy at the suit of the crown, and what is not.—Supposing that a conspiracy at the suit of the crown, means in the ordinary sense a criminal conviction, the incapacity seems to have been intimately connected with the villainous judgment to which it then led; but which is admitted by Mr. Justice *Blackstone* (vol. iv. 137.) to have become obsolete by long disuse. In some of the latest cases, where it is alluded to, it is expressly laid down (*Saville v. Roberts*, 12 *Mod.* 209, *anno* 1706.), that no villainous judgment could be given, but where the conspiracy was to take away a man's life. But whether that was so or not, it is not now material to enquire; because, by the later authorities, it seems to be admitted, that it is only for conspiracy under the denomination of *crimen falsi*, which brings the question back to the proper interpretation of that genus of crime.

Such seems to be the state of text authorities. Actual decisions are numerous, respecting crimes immediately affecting the purity of all public justice. Perjury, subornation, suppression by bribery, forgery of instruments, conspiracy to charge a person falsely with the crime of perjury; all these are intimately connected with the administration of public justice. So far the law has gone affirmatively;

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tively ; and it is not for me to say where it should stop negatively. The courts which possess a direct jurisdiction, may with perfect propriety go further upon principles of analogy or assimilation to cases already decided. But the province of this Court upon such a subject appears to be more limited. It must not tread paths which have not hitherto been trodden by those whose footsteps it is bound to follow : If it is to apply the severe penalty of the law, it must be upon a direct authority, not upon analogy or assimilation. The *crimen falsi* has no where been accurately defined ; nor the species of it authoritatively enumerated. There are chasms in the law that must be filled up by those to whom the law has more immediately confided a discretionary judgment upon such points. If I find an actual case in which *a conspiracy to cheat* has been held to carry with it this consequence, it is my duty to apply it to one that falls directly under the same class, though not resembling it in all circumstances : But if I find no such actual case (and certainly I have not been able to do so), then looking to what has been the inclination of the courts in later times, rather to narrow the ancient incapacity of witnesses than to open the door still wider ; looking to the variation which the law seems to have undergone in the consideration of very eminent judges, at the cautious hesitation of opinion with which this subject has been treated by the highest authorities, I do not find myself entitled to say that the affidavit of this person ought to be rejected in this Court, as being clearly inadmissible in all courts whatsoever. It has been asserted in argument, that

that affidavits made by him, have actually been admitted in the Court of Chancery, and in the Court of King's Bench and elsewhere; and these not exculpatory or defensive affidavits, but affidavits applying to mere civil rights of another nature. Whether the validity of these affidavits was objected to by the counsel, or considered by the court, I have not been informed; and therefore cannot consider them as authorities upon the subject, though perhaps it might be too much for me to say, that the admission, even without opposition, is a fact of no moment whatever. It is possible, and perhaps to be wished, that upon an appeal on the general merits of the present suit, the opinion of the proper judges may be invoked for the determination of this incidental question. All that I do has no effect, but that of admitting this particular affidavit in this Court, leaving the question of the general competency of Lord *Cochrane* to be definitively settled by the more appropriate judges.

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# PELICAN, MOODIE.

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Goods imported,  
in a *British* ship  
not manned and  
navigated accord-  
ing to law, are  
not liable to for-  
feiture, if the im-  
perfect manning  
of the ship was a  
matter of un-  
controllable ne-  
cessity.

**T**HIS ship being under *British* colours, and having on board 12 serrons of indigo, 10 tons of log-wood, 50,181½ dollars, and 1086 ounces insurgent dollars; and also a number of *Spanish* passengers, which came on board at *Campeachy*, was met with at sea by His Majesty's ship *North Star*, *Thomas Coe* esquire, commander, on the 7th *March* 1814, off *Negril* on the island of *Jamaica*, in the prosecution of her voyage from *Campeachy* to *Port Royal*, and was seized and brought to *Port Royal*, where she arrived on the eighth of the same month.

In the month of *March* 1814, a libel was filed against the schooner and cargo stating the fact of the seizure off *Negril* and reciting the following acts of parliament, viz. 12 C. 2., 7 & 8 W. 3., 15 G. 2., 26 G. 3., 27 G. 3., 34 G. 3., 43 G. 3.; and further stating, that on the 9th *February* 1814, 190 bales of dry goods, and four barrels of other goods were exported from *Port Royal* aforesaid on board the schooner, she not being of the built of *England*, *Ireland*, or of any of the colonies belonging to His Majesty, and wholly owned by the people thereof or any of them; and navigated with the master and three-fourths of the mariners of the said places only; and not  
8 being

being taken as prize and condemnation thereof made, and not having such proof of her built and property, nor documented as is enacted in and by the said several herein-before mentioned acts of parliament, whereby the said vessel hath become forfeited.

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The libel further alleged, that the said vessel being registered as a *British* vessel, and required to be manned and navigated by a master and three-fourths at least of the mariners *British* subjects; was not, when so seized as aforesaid, manned and navigated by a master and three-fourths of the mariners *British* subjects, contrary to the form and effect, true intent and meaning of the statutes in such case made and provided; whereby the said vessel, and all the goods, wares, merchandize, and specie became forfeited; one moiety to our sovereign lord the King, and the other to the use of the seizers; for that she was navigated by foreign seamen and mariners, not being natives of *Great Britain or Ireland*, nor of any of the colonies or plantations thereto belonging, nor His Majesty's naturalized subjects, the number of such foreign seamen exceeding three-fourths of the mariners employed to navigate the said schooner, and that thereby the said schooner, cargo, and specie became forfeited,

On the 21st of *April* a claim was given on behalf of *Salvador Presiat*, described as late of the city and parish of *Kingston*, but then an absentee from the island of *Jamaica*, a subject of the king of *Spain*, as the sole owner and proprietor of 23,000 *Spanish* milled dollars; and also for the rest of

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the dollars, and the indigo, on behalf of various other *Spanish* subjects.

The claimants in the said claim protest against the goods being liable to confiscation; and aver that some time in the month of *February* last, a certain schooner or vessel, called the *Pelican*, arrived on the coast of *Campeachy* in *South America*, where these claimants then resided; and the said schooner then and there was, and so continued until and at the time of her sailing from thence, and during her voyage, under the command of *William Moodie*, whom these claimants were informed, and believed to be a *British* subject, and had on board a *British* register, and was owned (as appeared by the said register and as these claimants were informed,) by *British* subjects, and was, as these claimants were informed and verily believed, in all respects navigated according to the *British* laws, and qualified to trade between the island of *Jamaica*, and the *Spanish* colonies in *America*; and these claimants being *Spanish* subjects, and having no concern or connection whatever with the owners of the said schooner, determined to ship and put on board the said schooner, and upon the faith and confidence of the said schooner's being owned by *British* subjects, and navigated according to the *British* laws now in force, and being qualified to trade as aforesaid, and with the intent to trade with his *Britannic* Majesty's subjects with integrity and good faith, did ship on board the before-mentioned articles; and that the claimants last-named, afterwards embarked in the said schooner as passengers, with

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with a view to come to this island, and to lay out their money in the purchase of merchandize;— that the vessel sailed from *Campeachy* on the 23d *February*, and was met with off *Negril* in the said island by the *North Star*, and detained.

Interrogatories were filed on behalf of the seisor, and also on the part of the claimant, and witnesses were examined thereon.

On the 28th *June* 1814, the cause came on before the Vice-admiralty Court at *Jamaica*, when the Judge was pleased to pronounce the specie and indigo to belong as claimed, and decreed the same to be restored; and pronounced the ship and 10 tons of logwood, for which no claim had been given, to be subject and liable to confiscation, and condemned the same; one moiety thereof to the crown, and the other moiety to the use of the seisor. From the restitution of the specie and indigo, the seizors brought the present appeal, and the case now came on for hearing on the same evidence as it had done in the court below.

## JUDGMENT.

Sir *William Scott*.—This ship was taken at sea, on the 7th of *March* 1814, off *Cape Negril* near *Port Royal* in the island of *Jamaica*, by His Majesty's ship *North Star*, Captain *Coe*, commander, and carried into that harbour. A libel was filed in the Court of Vice-admiralty there, stating several acts of parliament, and alleging various breaches of them, amongst others, that she was navigated by a crew consisting in more than three-fourths not native or naturalized subjects of His Majesty. She had on board ten tons of logwood, 12 serrons of indigo,

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50,000 dollars, and 1086 *insurgent dollars*, as they have been called. The libel prayed condemnation of the vessel and of all the goods laden therein. No claim was made for the ship, but no explanation is given why it was not, nor does it appear what proceedings were had against her, except that she was included in the sentence of condemnation with the logwood.

A claim was given on behalf of *Spanish* subjects as the proprietors of the dollars and the 12 serrons of indigo; and it alleged that this ship arrived from the coast of *Campeachy*, where these claimants resided, she being under the command of the *British* Captain *Moodie*, having a *British* register, and owned, as appeared, by *British* subjects, and, as these claimants verily believed, navigated according to *British* laws, and qualified to trade between *Jamaica* and *Spanish America*. The claimants had no concern or connection with the vessel, but they determined to ship in good faith and confidence the dollars and indigo, with intent to trade with His Britannic Majesty's subjects, and sailed for the port of *Kingston* with that intent, when taken by the *North Star*; and they prayed restitution of the dollars and indigo, which was finally decreed by the Court. Against this part of the decree the present appeal is brought. Another part of the same decree condemns the ship and the logwood, on pain of parties cited and not appearing. The grounds of the judgment, as it applies to the ship and cargo, are not at all stated, and they are to be collected only from the evidence, or from information in an *unauthentic* shape. The evidence is taken merely on  
interro-



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interrogatories, not on any plea on either side directly asserting a detailed statement of facts on which the respective prayers of the parties are founded, which would certainly have been commodious, as opening the direct issues which the parties had joined, and affording the opportunities of counter-pleas and cross-examination of the same witnesses. It appears very imperfectly, and only by inference, from the interrogatories, what were the real questions depending between the parties, or raised by the advocates. There seems to be no question as to the being *British* built and *British* owned. Her register was produced, her owners were living in the place, they had been her owners for a long time, and she had sailed from that place, as she had done before, to *Campeachy*, with a crew taken at *Kingston*. She was now coming to *Kingston* with an avowed intention to trade, these *Spaniards* bringing money and indigo for that purpose. A question has been raised *here* whether foreign coin or bullion might not have been imported in any ship, and by any person. Whether the question was raised *there* or not, *non constat*; It could not, I think, have been raised with much effect, as the later statutes seem to have obliterated the indulgence, shewn in the earlier ones, to that article of commerce. Nor does it appear that it was *there* objected that the vessel was seized before the actual importation had taken place. The intention of importing was avowed, and she was taken on the voyage to and in the neighbourhood of the island of *Jamaica*, although the exact place of her capture does not appear from the evidence.

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As far as can be collected from the draft of the interrogatories put on both sides, the point in issue seems to have been whether the manning of the vessel was conformable to the requisites of the statutes then in force.

Upon that question of fact no sufficient doubt can be raised in favour of the ship or the cargo, for it is indisputably clear that she was not so manned ; saving the master, *Moodie*, all on board were foreigners by birth. Some of them had served on board *British* ships, and one or two of them are said to have been furnished with proper certificates to this effect ; but allowing all that the witnesses say to be true, the qualifications of the crew fall far short of the demands of the statute. There is no satisfactory proof of a competent number (one-third) being qualified either by service or naturalization or denization, and no certificates are produced. Whether it was from a consciousness of this insufficiency, or what other cause it was that produced the non-claim for the ship, I am not informed. She dies and makes no sign. But the interrogatories addressed to the witnesses on behalf of the owners of the cargo, seem to put in issue, in the indirect way I have described, a fact which might perhaps have protected the ship, and certainly belonged to it more immediately than to the cargo, namely, that the imperfect manning was a matter of uncontrollable necessity ; (the reason for the deficiency being, as far as it can be collected from the interrogatories, that *British* seamen in the due proportion could not possibly be obtained at *Kingston*, the port from which she had sailed.) That consequently *British* ships would have been excluded  
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from the full benefit of the free port act, if that necessity was not submitted to. That cases of necessity are out of the reach of penal laws of this class. That the law has provided for that necessity only where it arises in a foreign port, but leaves it to provide for itself in the domestic port. That the provision for the employment of slaves was inapplicable, as black seamen, the property of *British* planters, could not be had, and therefore that the ship was manned as regularly as circumstances of necessity would permit. As far as I can infer, this is the only ground of defence set up; the case seems to abandon every other. As far as the claimants pursue their case in the evidence, they seem to urge this, and this only, and to consider all other matters of law or of fact to be insupportable. The evidence as to necessity is, I think, very strong. *Moodie*, the master, says that “the crew of the *Pelican* consisted, at the time of her sailing from *Kingston*, “of seventeen mariners, including himself as the “master, and which were on board at the time “of the seizure and detention; that he (*Moodie*) “is a *British* subject, the remainder *Spaniards*, “*Italians*, and one *Grecian*; that one only of the “crew, to his knowledge, had previously sailed “in the schooner, whose name is *Antonio Garcia*, “a *Spaniard*, and has belonged to her about seven “years, now boatswain and gunner, four others of “the crew, *Spaniards* and *Italians*, named *Joseph Peters*, *Joseph Alverio*, *George Mitchell*, and “*Joseph Lavera*, have served several voyages in “*Europe* on board different *British* merchant “vessels, as they have always informed him, the  
“ exami-

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“examinant.” In answer to another interrogatory, he says, he “knows of his own knowledge and experience, that it is almost impossible to man any vessel whatever, and more particularly vessels of the description of the *Pelican*, with *British* seamen, as such seamen are invariably pressed from on board by ships of war, and the men are in consequence unwilling to enter and sail on board such vessels as the said schooner *Pelican*, and verily believes that no other description of seamen could have been procured at any rate to man the said vessel on her sailing on her last voyage.” Another of the witnesses, *Regato*, says, that “the crew consisted of nineteen mariners, including officers and cabin-boy, at the time of the detention of the said schooner; they were, to the examinant’s best knowledge and belief, subjects of *Spain*; that several of them had navigated some years in *British* vessels; he saw the passport or certificate of one who had served many years on board a vessel of war, he cannot set forth the names of each of them, but saith that the major part had navigated in *British* merchant ships.” And he afterwards says, that “at the time the *Pelican* sailed last, it was impossible to procure any *English* sailors, and that the *Pelican* was compelled to sail with those she could then procure.” *Rose*, the next witness says, “there were nineteen mariners on board, inclusive of the officers, cook, and cabin-boy, at the time the *Pelican* was so seized and detained; believes they were all subjects of *Spain*; that most of them had navigated in *British* vessels, as examinant has been informed  
“by.

“ by themselves ; two of them he knew to have  
“ navigated in *British* men of war, but cannot  
“ set forth the names or the time they had served ;  
“ that it is very difficult to procure or to keep  
“ *British* mariners on board vessels of the same  
“ description as the *Pelican*, because they are  
“ always pressed by the men of war officers before  
“ the sailing from *Port Royal*, and that at the  
“ time the *Pelican* sailed, none but those who  
“ were on board at the time of the detention  
“ could be procured.” *Garcia*, the mate, says,  
“ that the schooner has ever since he has known  
“ her (about nine years) been employed in the  
“ trade between the city of *Kingston* and the  
“ *Havannah*, *Vera Cruz*, and *Campeachy* ; she made  
“ one voyage to the coast of *Campeachy* about six  
“ years ago, and the two last voyages were also  
“ made there, where, and to other ports where  
“ she has been, she always carried dry goods from  
“ *Kingston*, and returned therefrom with passengers  
“ and specie belonging to *Spanish* subjects, for  
“ the purpose of purchasing dry goods and other  
“ merchandize on their account and risk.” He  
further says, that “ the several claimants have  
“ respectively shipped divers quantities of specie  
“ and indigo on the coast of *Campeachy* in the  
“ month of *February* last past, for the purpose of  
“ coming to *Kingston*, as had been customary  
“ during the period aforesaid. Since examinant  
“ has known the schooner and purchased goods,  
“ he saith that the said schooner has always been  
“ given out and considered by every person who  
“ was in the habit of trading in her to be a  
“ *British* vessel, and in every respect qualified to  
“ trade

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“ trade in the voyages in which she was then  
“ engaged ; and the examinant verily believes  
“ that the claimants deemed her to be so qualified  
“ at the time they shipped their property on board  
“ of her, and did really so ship the same under  
“ that confidence and belief.” He says, “ that  
“ the crew of the schooner at the time she was so  
“ seized and detained, consisted of nineteen men,  
“ including the master, second captain, examinant,  
“ cook, and cabin-boy, that he believes they were  
“ all subjects of *Spain* ; that the major part have,  
“ to the knowledge of the examinant, navigated  
“ in *British* vessels for many years, both in the  
“ aforesaid trade and that to *Great Britain*, having  
“ seen the certificates of several of them obtained  
“ in *England*, especially two who had served  
“ many years on board *British* vessels of war.”  
He further deposes, that “ it is extremely difficult  
“ to man vessels of the like description as the  
“ *Pelican* with *British* seamen ; first, because  
“ they can never be kept under a reasonable sub-  
“ ordination ; secondly, because no master of  
“ such vessels is sure of leaving *Port Royal* without  
“ being visited by the navy officers, who never  
“ come on board without pressing all the *English*  
“ hands they find, whereby the owners experience  
“ great delay and expences, and besides that, the  
“ *British* sailors are themselves unwilling and loth  
“ to sail on board such vessels as the *Pelican* ; and  
“ he verily believes, that at the time of the sailing  
“ of the *Pelican*, it was almost impossible to man  
“ her with other mariners than those who were  
“ on board of her.” The last witness, *Fernandez*  
the carpenter, says, that “ the schooner has  
“ always

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“ always been considered and given out to be  
 “ an *English* vessel, and in every respect qualified  
 “ to trade in the voyage in which she was en-  
 “ gaged at the time she was seized and detained,  
 “ and that the claimants at the time they were  
 “ shipping their property, did really deem her  
 “ so qualified; and it was under that confi-  
 “ dence and belief that they put their specie and  
 “ goods on board her.” He further says, that  
 “ there were thirteen mariners exclusive of the  
 “ master, second captain, mate, cook, and cabin-  
 “ boy on board the schooner at the time she was  
 “ detained as aforesaid; that they were all sub-  
 “ jects of *Spain*, but had been navigating under  
 “ *British* colours for many years; several of them  
 “ had navigated in *British* merchant vessels from  
 “ *Kingston* to different ports in *England*, and  
 “ had their passports and certificates to that effect;  
 “ two of them had sailed in *British* men of war;  
 “ he cannot set forth the time, but that the major  
 “ part of the crew then on board, to the knowledge  
 “ of the examinant, had been navigating many  
 “ years in *British* vessels, and under *British*  
 “ colors;” and lastly, he says that, “it is almost  
 “ impossible to form a crew, or even one-third  
 “ part of a crew of *British* sailors, because  
 “ they are always pressed by the navy officers,  
 “ who visit the vessels on their sailing from *Port*  
 “ *Royal*, and that vessels of the same description  
 “ as the *Pelican*, are compelled to take what sailors  
 “ they can procure; that, at the time of pro-  
 “ curing the crew that was on board at the time  
 “ of the detention, it was impossible to procure any  
 “ other than those then engaged.” Here is cer-  
 tainly

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certainly a very strong body of evidence to show the impossibility of procuring a proper crew; and it is the stronger, because the fact, if it did not exist at all, must have been known to the court to be perfectly unfounded. The court was sitting in the very place; the custom-house could have disproved it, if it were capable of being disproved; but their acts certainly tend to confirm the truth of the representation; for they had cleared this ship on her outward voyage with this very crew as a qualified ship. She appears to have made other such voyages in like manner as a qualified ship. The fact therefore is fully established upon this evidence, unencountered by any opposing evidence, and apparently addressed to the personal knowledge of the court and the custom-house; that the ship was manned as correctly as circumstances of necessity would admit. Now if this be sufficient for the protection, the question occurs, why it was not good in the same degree for the protection of the vessel with which it was more immediately connected. Whether the court determined on this particular ground, the sentence does not inform me; nor upon what other ground. It has said that the sentence may be supported on the authority of the case of the *Enterprise*. That was a case in which no such necessity was pleaded; but in which the ship was condemned, and the goods imported by foreign owners were liberated. There was in that case, fair proof that the ship was sufficiently manned, but the register had been irregularly obtained; and it was argued that the *Spanish* shippers were not implicated in that fraud, nor at all cognizant of it. I think I  
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am bound to pay all due respect to the authority of that case,—a case in a court, which by its constitution is a high court, and which was still higher in the character of those who composed it. But it was an undefended case, and therefore the attention was less anxiously called to the language of the statute. I have had occasion to observe the rigorous obligation imposed upon the foreign shipper by the whole system of these laws; the provisions and penalties of which are more directly and principally fulminated against the goods; the vessel comes in only secondarily, and, as it were, under an *ac etiam*. The foreign shipper is to see that he puts his goods on board a proper vehicle: He is therefore to know the provisions of our fiscal law, with all the variations under which it is so apt to fluctuate. He has to interpret their provisions accurately; and to apply them to cases of fact, which he has very insufficient means of ascertaining; for how is he to ascertain the qualifications of a crew with any degree of certainty or convenience? Yet the shipper is the party who stands forward to the severity of the law. It is impossible not to feel this, and not likewise to feel a painful anxiety to moderate, as far as the equitable powers with which the Court is entrusted will permit, between the verbal rigor of the statute and the extreme and various dangers of fraud, to which the interests of *British* navigation might be exposed by indulgent interpretations. In the case of the *Bever* it was not without great reluctance that the Court came to its final judgment.

There

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There the shippers were *British* merchants, and therefore bound to a stricter conformity; yet the hardship of the case did not escape my own private judgment at the time, nor my recollection at the present moment.

From the very imperfect information I have been able to collect relative to the case of the *Enterprize*, I am not authorized to say that the Court laid it down as an universal position, that whenever the foreign shipper is not a direct party to the irregularity of the pretended *British* ship, he is not at all answerable for his goods so imported; and that he incurs no hazard whatever. I find great difficulty in admitting that principle when I look to the terms of the statute, and great danger, when I look to the varieties of fraud that may shelter themselves under it, to the extreme hazard of our colonial and navigation system. If the fact be that this case has been so decided upon, the authority of such a principle being established by the case of the *Enterprize*, it is fit that the extent of that case should be accurately understood. The courts of vice-admiralty will doubtless act upon it generally upon a clear understanding, that such was the law as laid down by the superior tribunal. It would therefore be extremely satisfactory to my mind, if this point were fully and finally determined by the highest authority. I shall, however, decide on a different ground;—on the ground of necessity, which I think has been established in the court below. The anomaly will still remain, that the ship, to which the excuse would have applied in a manner more strongly and

and directly than to the cargo, has been condemned: but, thinking as I do, that the necessity has been fully proved, and that it must have been known to the Court, whether it existed or not, I shall not disturb the sentence of restitution. I shall however allow the seizors their expences.

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The sentence of  
a Vice-admi-  
ralty Court,  
condemning a  
French ship for  
being employed  
in the slave  
trade, and for-  
cibly resisting  
the search of the  
king's cruisers,  
reversed.

THIS was the case of a *French* vessel which sailed from *Martinique* on the 30th of *January* 1816, destined on a voyage to the coast of *Africa* and back, and was captured ten or twelve leagues to the southward of *Cape Mesurada*, by the *Queen Charlotte* cutter, on the 11th of *March* in the same year, and carried to *Sierra Leone*. She was proceeded against in the vice-admiralty court of that colony, and the information pleaded,—1st, That the seizors were duly and legally commissioned to make captures and seizures. 2d, That the seizure was within the jurisdiction of the court. 3d, That the vessel belonged to *French* subjects or others, and was fitted out, manned, and navigated for the purpose of carrying on the *African* slave-trade, after that trade had been abolished by the internal laws of *France*, and by the treaty between *Great Britain* and *France*. 4th, That the vessel had bargained for twelve slaves at *Mesurada*, and was prevented by the capture alone from taking them on board. 5th, That the brig being engaged in the slave-trade, contrary to the laws of *France*, and the law of nations, was liable to condemnation, and could derive no protection from the *French* or any other flag. 6th, That the crew of the brig resisted the *Queen Charlotte*, and piratically killed eight of her crew, and wounded twelve others. 7th, That the vessel being engaged in this illegal traffic, resisted the king's duly commissioned cruisers, and did not allow

allow of search until overpowered by numbers. And 8th, That by reason of the circumstances stated, the vessel was out of the protection of any law, and liable to condemnation. The ship was condemned to His Majesty in the Vice-admiralty Court at *Sierra Leone*, and from this decision an appeal was made to this Court.

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For the respondent the *King's Advocate* and *Adams* contended, that the stipulation in the additional article of the treaty between *Great Britain* and *France*, of the 20th of *November* 1815, carried with it a legal presumption that the slave-trade had been abolished by the laws of *France* prior to that period ; and that the official declaration of M. de *Talleyrand*, dated on the 30th of *July* in the same year, carried back the presumption still farther. They admitted that an *intention* only on the part of the *French* government to abolish the traffic would not be sufficient, and that there must be some *legal act* for that purpose ; but they argued that the treaty itself was evidence that such an act had really taken place. That if not a proof conclusive in law, it was at least sufficient to throw the *onus probandi* most strongly on the adverse party, and imposed upon them the necessity of shewing that, by the laws of *France*, the slave-trade was allowed at the time of capture : the legal presumption was, that the treaty had been duly performed, and it was for the opposite party to rebut the presumption. They then cited the case of the *Amedie*, in which it is laid down generally by the superior court, that the slave-trade is *prima facie* illegal ; and that

App. (N.)

App. (I)

Vol. i. p. 84.  
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App. (L.)

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the burthen of proof is on the claimants, to show that the laws of their own country permit such a traffic.

The evidence, however, they contended, contained explicit proof that the treaty had actually been carried into effect; and in support of this, they again referred to the official declaration of the *French* minister, stating that *directions had been given* for the abolition of the trade. This, they said, was a declaration *not of an intention to abolish, but of the abolition itself,—of an act done and past.* This was still further confirmed by a subsequent act; viz. the ordonnance of the *French* king in *January* 1817, which inflicted particular penalties on persons engaging in the slave-trade. It was no just inference that because additional penalties were imposed upon the continuance of the trade, there was therefore no previous abolition of it; for prohibitions of particular practices were often enacted in the first instance, and afterwards additional penalties imposed, as in many of our own acts of parliament.

There was, therefore, the fullest and most complete evidence of the abolition; and that this was the state of the law, was confirmed by the conduct of the parties themselves. The master admitted that he had heard that the slave-trade had been prohibited by the laws of *France*; there was no direct authority from the governor of the colony, authorizing or recognizing the trade; and the ship's papers manifested a studious concealment that she was at all engaged in it. The conduct of the parties was in itself an acknowledgment of their  
sense

sense of the illegality of the trade ; of their consciousness that they were offending against the laws of their own country.

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Adverting to the character of the vessel, they admitted that she was *French* ; having a register as such, and bearing the *French* flag. But she had likewise *British* colours on board, and had recently been the property of *British* subjects ; and therefore there was, on the most limited grounds, a special justification to persons under *British* authority to examine into her national character. It was not, from a mere idle curiosity that this examination was resorted to ; for it was expressly certified that the vessel had been *British*, and there was nothing but the mere assumption of flag to distinguish her as having acquired another character.

With respect to the employment of the vessel, they contended that there was positive proof, in the evidence of two of the witnesses, that the vessel was actually about to take twelve slaves on board at *Mesturada* ; that the act certainly had not been completed, neither was the consummation of it necessary to render the property liable to confiscation, for the Court had already laid it down that, in cases of this kind, it made no difference in what stage of the employment the ship was taken, “ whether in the inception, or the prosecution, or “ the consummation of it. Vol. 1. p. 86.

They then referred to the articles which were found on board this vessel ; the quantity of water and of provisions, consisting principally of beans ; the number of irons, of which there was no specification in the manifest ; and the platforms and decks

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decks of the vessel; from all which they inferred that the trading in slaves was one of the principal objects of the voyage, and not an incidental and secondary purpose; but that the ship had been sent mainly and primarily to engage in that particular trade.

The vessel was taken to *Sierra Leone*, and the case brought before the Vice-admiralty Court in that colony; a court constituted by patent, and possessing nearly the same authority as the High Court of Admiralty. In that court an information was exhibited; and the Judge, considering that the vessel was engaged in a trade contrary to the general law of nations, and to the particular laws of her own country, had very properly rejected the claim, and passed a sentence of condemnation on the property. The jurisdiction of that court, they contended, could not now be called in question by the claimant, since he both petitioned the Judge there to proceed, and has since regularly appealed against the sentence, instead of acting on the assumption that it was a mere nullity. The appellant, therefore, having recognized and voluntarily submitted to the jurisdiction, cannot now be heard to question it.

On these facts, and on the authority of former cases, they contended that the claimant had precluded himself from claiming restitution of his property. The objection that arises is that familiarly known under the title of *turpis causa*. Courts of justice are bound not to protect or encourage crimes; and to take care that they do not render themselves accomplices of wrong-doers. This was the principle acted upon in the case of the *Amedie* in



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in the Prize Court; and in the *Diana* the same ground of exclusion was deemed proper to be applied in this Court; for the Court there said, "The general injustice of a claim may be the subject of cognizance in a municipal court. A claim founded on piracy, or any other act, which in the general estimation of mankind, is held to be illegal and immoral, might, I presume, be rejected in any Court on that ground alone."

This Court, in acting on the general principles adopted in other courts, has held that parties are debarred from claiming restitution by the circumstance of their becoming alien enemies; and there seems to be no ground of distinction why they should not also be debarred by an offence of this kind, which has been adjudged to have that effect in the Prize Court. It is a common expression, that parties are to come into Court with clean hands; but here they come into court with hands stained with blood, with the guilt of murder voluntarily incurred in the prosecution of another act in itself scarcely less criminal.

They admitted that the courts of one country are not authorized to take cognizance of breaches of the mere municipal law of another, but contended that the present was a case of a very different description; for here the Court proceeds on the breach of a *general law*, and only adverts to the law of the particular country to see whether it affords any protection to the offender. It is most reasonable that the slave-dealers should be restrained by foreign cruizers, as well as by those of their own country, otherwise an abolition in which all the great powers of *Europe* have joined might be

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rendered perfectly illusory by the act of the pettiest state in the world; and peace in *Europe* would only be the signal for war in *Africa*.

*Lushington*, for the appellant, denied the 1st, 6th, and 7th positions assumed in the information, and contended, that, in time of peace, on the high and open seas, where *Great Britain* does not lay claim to any peculiar jurisdiction, there exists no right of searching the ships of other nations. The capture in question was made 10 or 12 leagues to the southward of *Cape Mesurada*, and at the distance of at least 120 miles from the peninsula of *Sierra Leone*, which is bounded on the north by the river *Sierra*, on the south by the river *Caramancas*, on the east by the river *Bunie*, and on the west by the ocean. The place of capture was therefore as much removed from the local jurisdiction of *Great Britain* as the middle of the *Baltic Sea*, or of the *Atlantic Ocean*. It was pleaded, that the *Queen Charlotte*, the captor, was entitled to seize vessels employed in the slave-trade, being duly commissioned; but he denied the fact, that she had any commission for that purpose, or that any such commission could issue by the general law of nations, without some express convention for the purpose. The claim then amounted to this, that there existed a right of search during peace. If such a right existed at all, it must be founded on public law, or upon express treaty. If upon public law, the right must be shown necessarily to arise from some principle admitting of no dispute. Now, where was this principle to be found? there was an entire absence of all authority in the writers on public laws

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law, and no instance could be shown of the exercise of such a right, from time immemorial: this was conclusive proof against its existence; and there was not even a claim advanced on behalf of *Great Britain* or any other country. If the right were claimed by virtue of a convention, that convention must be shown. The *French* nation might, if they pleased, concede to *Great Britain* the right of searching their ships any where, but so important a right could not exist by implication. It was a right scarcely consistent with the independence of that country, and could not be claimed but in virtue of express agreement. Even if it should be expressly stipulated in a treaty between *Great Britain* and *France*, that *France* would no longer permit this trade to its subjects, no right of seizure and confiscation would thereby arise to the *British* nation. Where the conditions of a treaty were violated, the law of nations directed the mode which should be pursued in order to obtain redress, without immediately resorting to force and bloodshed. The first step was application to the government of the offending party, and it was not until after a denial of justice that recourse could be had to violence to obtain reparation. It was so, not only where an injury had been received contrary to the general laws of nations, but even in cases expressly provided for by treaty. *Great Britain* had already strenuously maintained this principle. When in 1789 certain *British* ships were seized for illegally trading contrary to the treaties between *Great Britain* and *Spain*, *Great Britain* would not even enter into the question of right until an apology

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apology was made for the act of violence committed, and full reparation made to those who had been injured. In the late treaty with the *United States* there were certain stipulations as to the fisheries; but it could not be maintained that either nation should support its rights by capture on the high seas. If then this were the true doctrine, even where the offence has been committed against the party seeking redress by violence; *a fortiori*, was it where the offence was committed against third parties, with whom we have no alliance or treaty? It was impossible that so strong a right could exist to redress the injuries of others, as there might be to avenge our own. The right of granting reprisals, which those violent acts in effect were, did not exist where the acts were done towards third parties. But the clearest and strongest argument against the existence of this right of search and confiscation in time of peace arose from a consideration of the extent to which, if admitted at all, it must necessarily go, and the consequences which might and would result from it. If *British* ships had a right to examine *French* ships on the high seas, on the suspicion of their being engaged in this trade, they might stop, detain, and bring in every *French* ship leaving a *French* port. The right of search would extend over all the ocean; and *vice versa*, the whole mercantile navy of *Great Britain* would be subjected every where to the search of *France*, *Denmark*, *Sweden*, and *Holland*; and then how were such cases to be adjudicated? If *Great Britain* was not prepared to submit to this degradation, she had no right to inflict it on others.

others. The consequences of resorting to it upon this occasion had been bloodshed and murder ; nine lives had been lost, and 15 of the crew wounded ; and these consequences must inevitably follow, wherever violence was resorted to. It was plain then, that no right of search existed, not even though *France* might have stipulated with *Great Britain* that she would not allow her subjects to carry on the slave-trade. If any right of search were necessary for the suppression of the trade, it must be arranged by convention between the contracting parties. It could not originate in the act of one alone ; it must be under limitations and conditions as to time, place, and circumstances ; and the present lawless attempts at extirpating it by violence, could have no other effect than that of irritating foreign nations, and protracting the period of its utter extinction. If, then, there existed no right of search and detention, all that had been done was mere lawless violence ; unjust *ab initio*, and a violation of the law of nations. The seizers were the aggressors, and had committed an act of piracy.

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He then proceeded to argue, that it was not possible to contend that the slave-trade was piracy, or that those who engaged in it might be destroyed at the pleasure of any nation which has abolished it, even though so engaged against the internal regulations of their own government. It was not piracy either by the law of nations, or the law of *Great Britain*. It was not by the law of nations, because to make it so, it must either have been so considered and treated in practice by

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by all the civilized states in *Europe*, or made so by virtue of a general convention; whereas, on the contrary, it had been carried on by all nations, even by *Great Britain* herself, until within a few years, and was at this moment carried on by *Spain* and *Portugal*, and not even at the present hour prohibited altogether by *France*. If it were piracy, *Spain* and *Portugal* could not carry it on; for pirates might be seized, be they of what nation they may, but the slave-trade was entirely different from piracy. All nations had a right to seize pirates, because they were general robbers, *hostes humani generis*; their violence was not confined to one nation, but was universal; and the general law of self-preservation gave a right to all to seize persons so conducting themselves. But in the slave-trade, it was quite different. The acts of injustice were confined to one description of persons with whom other nations had no concern; and there was no possibility of the same acts being practised against *Great Britain*. The slave-trade might resemble the conduct of the *Algerines*; they plunder and enslave other nations without a cause; but this country had never considered them as liable to general detention, nor attempted to visit upon them their outrages against others, so long as they abstained from attacking *British* subjects. The slave-trade could not be considered by *Great Britain* as piratical when committed by foreigners, because it was not piracy by the laws of this country. Piracy was a defined crime, and there had been laws existing against it for centuries; but neither before nor since the abolition had any individual

individual been prosecuted under those laws. An act had been passed in 1811, to make the slave-trade a criminal offence punishable by transportation, all which clearly demonstrated that piracy it was not. But even if it were piracy, the property belonging to pirates, not taken *piratica*, was not confiscable by an act of piracy until conviction; for, until conviction, even pirates might dispose of their own property. Here there was no property belonging to third parties—no slaves; neither was there any proceeding according to law; for piracy must be tried according to the statutes, in a very different form. If, then, there was no right of search, the resistance was lawful, and no penalty could arise from it, under any law whatsoever.

He then proceeded to deny that the capture had been made within the jurisdiction of the court of *Sierra Leone*; and contended that that court had no jurisdiction whatever. It had no jurisdiction *ratione loci*, because the seizure was made out of the limits within which its ordinary jurisdiction was confined: none, on account of *the subject matter*, for, *that* was not triable by any municipal court whatsoever: none, by reason of *any act of parliament*, for there was *none such*, and if there were, it could not be binding on foreigners. There was not one word in the warrant for appointing this court, or in the patent, whence a shadow of jurisdiction could be drawn; the prize commission was at an end by the termination of the war; and although some of the forms observed in the present proceeding were prize, yet the ship was prosecuted as a forfeiture. The want of jurisdiction

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51 G. 3. c. 23.

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2 Robinson, 245.

diction was, therefore, manifest on the face of the proceedings; they were all grossly irregular and unjust—all *coram non judice*. In the first instance, the witnesses were examined on prize interrogatories, then cross-examined *tiva voce*; next an information was filed, then a monition issued, and then the witnesses were examined again on fresh interrogatories; the proceeding was therefore, neither according to the law of nations, nor to the civil law, nor to the common law; the party proceeded against had no legal means of defence; and was therefore entitled to have the sentence annulled with costs and damages, according to the precedent of the *Fabius*.

He then adverted to the position that the vessel belonged to *French* subjects or others, and was fitted out for the purpose of carrying on the slave-trade, after it had been abolished by the internal laws of *France*, and by the treaty between this country and *France*; and was therefore condemnable. That the property belonged to *French* subjects, he observed, was fully admitted: a possessory right was quite a sufficient proof of property in a municipal court, but here there was other proof. The ship belonged to *Teychoire* and *De Chapté*; so also the cargo, except that the master had an interest to the extent of 8,000 dollars. There was the *French* register on board in the name of *Teychoire*; the passport; and the clearance from the custom-house at *Martinique*. There was also the evidence of the master in preparatory, and of all the other witnesses, as to *De Chapté* being the owner; and there was nothing to contradict this testimony, or to shew that the property



perty belonged otherwise; no *averment* even of the property being *British*. With respect to the vessel being fitted out for carrying on the slave-trade, he did not mean to deny that she was adapted for that purpose; but there was no evidence to shew that that was the certain object of the voyage; and, adverting to the evidence, he contended that the slave-trade was a contingent object of the voyage, and no more.

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He then proceeded to contend, that the trade was not abolished by the internal laws of *France*, though by treaty it was agreed that it should be so. *Buonaparte*, during his short possession of the government after his return from *Elba*, abolished the slave-trade, and referred the punishment of any violation of his decree to the *French* tribunals. App. (G.)

On the 27th July 1815, Lord Castlereagh wrote to M. de Talleyrand, urging that the slave-trade should not be revived, and questioning whether by the law of *France* it had not been abolished. Talleyrand in reply, by letter dated July 30th 1815, stated, that the edict of *Buonaparte* was a nullity, but that the King had issued directions for the traffic to cease from the present time every where and for ever. By the additional article to the definitive treaty, dated November 20th, 1815, it was recited that *France* had abolished the slave-trade, and that she would with *Great Britain* concert measures for its entire abolition by all nations. App. (H.) App. (I.) App. (N.)

On the 15th of January 1817, Sir Charles Stuart wrote, and requested a copy of all orders, &c. relating to the abolition of the *French* slave-trade; and on the 27th of January 1817, he received an answer, App. (P.) App. (Q.)

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answer, enclosing an ordinance dated the 8th of *January* 1817. It was therefore quite clear, that, up to *January* 1817, there was no public ordinance of the *French* King prohibiting this trade; for if there had, Sir *Charles Stuart* must have known it, nor any ordinance at all; for if there had, Sir *Charles Stuart*'s note must have called it forth; and the *French* government must have been anxious to produce it as a proof of their good faith. In the note it was spoken of as *the* ordinance, which negatived the existence of any preceding ordinance. There could be no doubt, therefore, that the trade had not previously been abolished by any decree whatsoever. The ordinance itself did not abolish it totally, but merely abolished the introduction of slaves into the *French* colonies; and then it reserved to the *French* tribunals the right of adjudging the cases by their own law. The case then came to this—that the slave-trade was not abolished by *Buonaparte*'s decree after the restoration of the King; that the *British* government had not been able to extract any ordinance prior to *January* 1817; that none did exist; and therefore that a slave adventure was lawful prior to 1817, and was so still *sub modo*, and triable only in *France*; and all presumption in favour of the existence of orders in conformity to stipulations was done away by the letter of Sir *Charles Stuart* and its answer. With respect to the point that the vessel had bargained for twelve slaves, and would have taken them on board if not prevented by the capture, he contended that ~~that~~ fact was not sufficiently proved; he objected to the legality of some of the depositions, and argued that

that the fact was negatived in others; that it was quite improbable that twelve slaves should be taken on board to superintend others; and that the vessel not having been taken *in delicto*, no offence was consummated, nor was there any offence against the laws of *France*. Upon all these considerations, he submitted, that the decision of the court below must be reversed, and the ship restored with costs and damages.

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*Dodson*, on the same side, contended, that the ship had been illegally taken, because the cruizer by which she had been seized, was not duly authorized to capture foreign vessels. No commission had been produced, and it was not very probable that there was any such in existence; since the statute enabling governors of colonies to authorize persons to seize and prosecute ships engaged in the slave-trade was the law of this country only, and was strictly confined to *British* subjects, or to persons resident within *British* dominions.

51 G. 3. c. 23.  
s. 8.

He then laid it down, as a primary and fundamental rule of the law of nations, that the right to visit and search foreign ships on the open sea does not exist in time of peace; and this position he proceeded to establish upon the three grounds of *reason, authority, and practice*.

During the existence of war neutral vessels might be engaged in the conveyance of enemy's property, or of articles contraband of war, calculated to strengthen the military resources of the enemy. The duty of self-protection gave all belligerent states a right to secure themselves from the injurious effects of such practices, and

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such security could only be obtained by visitation and search. This, therefore, was a right founded on necessity, but, by that necessity it was also to be strictly limited. Now it was obvious that during peace no such danger could exist: visitation and search was not required for any purposes of self-protection, and consequently, the practice had no longer a just and lawful foundation. During peace no state was privileged to appropriate to itself the main ocean, or to interdict the free and uninterrupted use of it to the commercial marine of other countries. If *Great Britain* had a right to search foreign ships, foreign ships would in their turn have a right to search those of *Great Britain*; for the rights of all countries must in this respect be equal. *Great Britain* had no exclusive rights upon the ocean; none which did not equally belong to all other nations. The *empire of the seas*, in the modern acceptation of the term, does not imply any exclusive legal privileges; and the only meaning that can justly be assigned to it is, that in time of war the nation possessing it has a perfect mastery over the fleets of the enemy, and can secure to itself all the important advantages arising from such a superiority; but in time of peace it conferred no peculiar privilege. If the right of visitation and search belonged to *Great Britain*, it must equally belong to *France*, and to all other nations. They must all, even the pettiest state, have the liberty of stopping every where (for if any where, then every where) British vessels; and how could Great Britain endure this? If then she was not prepared to submit to such treatment from others towards herself,

herself, she must forbear to exact submission from them ; for it was with nations as with individuals, they must learn not to do to others what they would not suffer to be done to themselves. It had been asked, whether peace in *Europe* was to become the signal for war in *Africa* ? and asserted that it must become so, if slave-traders were to be restrained only by the cruizers of their own nation ; but what course of conduct was so likely to lead to war and violence, as that of endeavouring to enforce the claim of visitation and search against the vessels of foreign and independent states ? The consequences must naturally and necessarily be, what they had been in the present instance, the loss of lives, and the destruction of property ; and it was impossible to foresee to what an extent these consequences might go, or what mischiefs might not be produced by them. If there existed a right to bring in any one ship, then, there must be the same right to bring in all, and at all times ; independent nations would be irritated, and wars and tumult would be produced, and perpetuated throughout the world.

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With respect to the authorities upon which the right of visitation and search would require to be supported, he observed, that such a right in time of peace had never been asserted by any writer on the law of nations. None of them went further than to assert that a *belligerent* might lawfully search foreign ships, and their silence on the subject of this right, during peace, was almost conclusive against its existence. On the other hand, numerous passages are to be found in writers of the greatest celebrity, from which the contrary doc-

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trine is fairly to be inferred. The right of navigating the ocean freely and without molestation, is asserted every where, in every page of the best authors, such as *Grotius*, *Wellwood*, *Vattel*, *Vasquius*, &c.; quotations almost innumerable might be made to this effect; but the principle was so clear that it was scarcely necessary, or indeed proper, to trouble the Court with authorities in support of it.

Adverting to the *practice* of nations as sanctioning or disavowing the right in question, he observed, that the *Portuguese*, at the time of their great power in the *East Indies*, wished to exclude all other *European* nations from any commerce with that portion of the globe, and claimed the right of detaining ships engaged in such commerce.

B. 2. ch. 2. s. 24.

This, which *Vattel* calls “a pretension no less iniquitous than chimerical,” was made a jest of by the nations whose commerce was interdicted, and they agreed to look upon any acts of violence committed in support of it, as just causes of war.

The answer of Queen *Elizabeth* (anno 1582) to the *Spanish* ambassador upon a similar occasion, was express upon this point; she stated broadly

Vide Camden.

“that her subjects had a right freely to navigate the vast ocean, since the use of the air and of the sea was common to all.”

In 1737, *Spain* again claimed the right of searching *British* ships in the *American* seas; but this asserted right was again expressly denied by *Great Britain*, and the conduct of *Spain*, in this respect, was termed by Mr. *Pitt* (afterwards Lord *Chatham*) “an usurpation, an inhuman tyranny claimed and exercised over the *American* seas.” It occasioned a general indignation throughout the kingdom, and

an instant demand for redress. *Spain*, in consequence of the remonstrances addressed to its government, stipulated to make good the losses sustained by *British* subjects, which stipulation implies an admission that she had done wrong. On non-payment of the remuneration agreed upon, orders for reprisals were issued by *Great Britain*, and these were followed by the war which terminated in the peace of *Aix-la-Chapelle* in 1748. In confirmation of this statement, he read several extracts from the addresses of the Lords and Commons, His Majesty's answers, and other official documents. He then referred to the case of the *British* ships captured at *Nootka Sound* in 1789, which he observed was nearly similar. There, a demand was immediately made by *Great Britain* for adequate satisfaction, and the restitution of the captured vessels, accompanied by a refusal to enter upon any discussion whatever until that demand had been complied with. A similar claim, lately made on the part of *Sweden*, had been strenuously and successfully resisted by *Great Britain*.

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If then the right of search does not exist under the *general law of nations*, is it founded on any *treaty* between this country and *France* as applicable to the slave-trade in particular? No.—*France* was asked to make such a treaty, and gave a decided negative to the proposal. This appears from the papers submitted, in *April* 1815, by order of the Prince Regent to the House of Commons, on the subject of the application of the *British* government to that of *France*, for the abolition of the slave-trade, and particularly from

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the letter of Lord *Castlereagh*, 6th *August* 1814, to the Duke of *Wellington*, and the consequent correspondence between his Grace and Prince *Talleyrand* and M. *de Jaucourt*. The Duke of *Wellington*, on communicating to Lord *Castlereagh* what had passed, states, that the proposal of a reciprocal right of search in the *African* seas was so disagreeable to the *French* government and nation, “*that there was no chance of succeeding in getting it adopted.*” Afterwards the matter was again taken up in the congress of *Vienna*, with a result quite as unsatisfactory; for in one of the conferences there held, the *French* minister expressly declared that “*he could admit no other maritime police than that which every power exercised over its own vessels.*” It is clear therefore that, neither by the general law of nations, nor by a particular convention between the two states, does the right of visitation and search exist. Even if the two countries had reciprocally agreed to prohibit the slave-trade, and to permit the right of search, a refusal to abide by this agreement by the subjects of one of them, would not justify the other in immediately resorting to the measure of capturing their ships. The first step to be taken, in case of breach of the treaty, would be remonstrance by the offended party; and if that was disregarded, then, but not before, reprisals might issue. This was the utmost that could be done by the law of nations, if it was our own interest that had been affected; *a fortiori* where the injury of which we had to complain was directed against the interests of a third party, namely, the natives of *Africa*.

It



It is charged in the information that this ship was taken within the jurisdiction of the Vice-Admiralty Court at *Sierra Leone*; but this is not made out in proof; on the contrary it appears, from all the evidence in the cause, that the capture was effected ten or twelve leagues to the southward of *Cape Mesurada*, which is at a great distance, from the limits of the colony, as settled by act of parliament. There is no pretence for saying that the original and ordinary commission of the Judge would give him jurisdiction beyond those limits, nor has there been any subsequent extension of the jurisdiction of that particular court. The act for the abolition of the slave-trade gives no such jurisdiction, at least so far as the subjects of foreign states, not engaged in hostilities with this country are concerned, for one part of it applies only to the property of *British* subjects, and to persons resident within *British* dominions, and the remaining part to slaves taken as prize during war. The only other statute which extends the jurisdiction of Vice-Admiralty Courts was passed for the purposes of the revenue laws, and is expressly confined to Courts in *America*. The capture therefore was made neither within the limits of the colony, nor the jurisdiction of the Court at *Sierra Leone*. The whole transaction was *coram non judice*, and the proceedings altogether a nullity.

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31 G. 3. c. 55.  
s. 44.

47 G. 3. c. 36.

49 G. 3. c. 107.

It has been said, that the claimants come into Court with hands stained with blood; but that stain rests on the captors who attacked, and not on the claimants who defended themselves. As there existed no right of search, all that the cap-

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tors have done is lawless violence; they were the aggressors in violation of the law of nations, and all the evil that has followed must be attributed to them.

It has been argued, that the party being brought into Court, whether rightly or not, cannot receive restitution because he is in *delicto*. But if *some Courts* may act upon the principle of refusing restitution on this ground, it is by no means clear that *all Courts* are possessed of the same power. It may be different in the Instance Court of Admiralty from what it is in the Prize Court. But what is the *delictum* here? In the information it is charged to be *piracy*; but it has been demonstrated by Dr. *Lushington* not to come within any legal definition of that offence. Then it is said, if not an offence against the law of nations, it is an offence against the internal laws of *France*; but are the municipal Courts of one country, armed with authority, to notice offences against the internal law of another country? How can the *French* law give jurisdiction to an *English* Court sitting at *Sierra Leone*? Both the decree of the usurper (which the present *French* government holds to be null) and the ordinance of the King, which purports to be dated on the 8th of *January* 1817, provide that offences by *French* subjects shall be tried in *French* Courts. They direct, likewise, the mode in which the penalties shall be applied; and how is it possible that a *British* Court sitting at *Sierra Leone* can apply the forfeitures as directed by the *French* law?

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Having

Having in the next place noticed the irregularity with which the cause had been conducted in the Court below, he proceeded to contend, that no sufficient proof had been produced that any *French* law prohibiting the slave-trade was in force when the present transaction commenced. The ordinance of the 8th *January* 1817 being posterior in point of date, could have no bearing upon it. The decree of the usurper was considered by the legitimate government, then restored, to be null and void, and could therefore have no operation. The treaty of the 20th *November* 1815, though containing an assertion that the slave-trade was abolished in *France*, did not purport to be in itself a law forbidding *French* subjects to engage in the traffic; and even if that treaty could be considered as amounting to a prohibitory law on the subject, it was not known at *Martinique* when the present voyage commenced, and consequently was not binding on the subjects of the *French* crown resident within that part of its dominions. The declaration contained in the *French* Minister's letter (30th *July* 1815), that the King of *France* had issued directions that the traffic in slaves should cease throughout his dominions, could not in itself be considered as conclusive evidence of the *French* law, much less as the law itself. *Non constat* what became of those directions, or to whom they were addressed. Certainly it is not in proof, either that the directions themselves, or any law or ordinance resulting from them, have been duly promulgated within the *French* dominions. It is said, however, that this assertion of the *French* Minister respecting the

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the directions issued for the abolition of the traffic, coupled with the recital in the treaty to the same effect, is at least presumptive evidence of the *French* law, and throws on the claimant the burthen of proving it to be otherwise ; but the weight of this burthen is entirely removed by the production of the ordinance of the 8th *January* 1817, which, in answer to an application from the *British* Minister for ordinances, laws, &c. is produced as *the* ordinance, and which must therefore be considered as *the only law* which had been passed on this subject. If any previous laws or ordinances had been in existence, they must have been produced when so demanded. It was clear therefore, that no such laws or ordinances had been passed by the *French* government until after this transaction had taken place, and consequently that no offence had been committed against the laws of *France*.

*The King's Advocate and Adams* in reply admitted the proposition to be true *generally*, that the right of visitation and search does not exist in time of peace, but denied it to be so *universally*. Occasions, they said, may and must arise at a period when no hostilities exist, in which an exercise of this power would be justifiable, and instanced the case of a foreign ship exporting goods from a *British* colony contrary to the provisions of the navigation laws. A vessel which has been guilty of so serious an offence against the laws of this country may be visited at sea by a *British* cruizer, and brought before a *British* tribunal for legal adjudication. The rule of law, therefore, which has been contended for on behalf of the appellant, cannot be maintained as an universal proposition, but

but is subject to exceptions, and within those exceptions must be included the present transaction, which is a transgression not only of municipal law but likewise of the general law of nations. That the property of parties so offending should be liable to seizure and confiscation is not a novel doctrine now for the first time attempted to be introduced into the code of the law of nations. Even at so distant a period of time as that in which the laws of *Oleron* were framed, it was permitted to seize the property of all persons enemies to the holy catholic faith in the same manner as that belonging to pirates. Piracy, therefore, was not, as has been contended, the sole ground of seizure in time of peace. The enemies of the holy catholic faith were in those days not deemed within the pale of the law of nations, and therefore their property was liable to seizure wherever it might be found. In whatever light the slave-trade may have been viewed in former times, it must no longer be deemed within the protection of the law of nations, especially since the declaration signed by the ministers of the different *European* powers assembled in congress at *Vienna*, that the trade was *repugnant to the principles of humanity and of universal morality*. From that period at least, a traffic in slaves must be considered *a crime*, and it is the right and duty of every nation to prevent the commission of crime. A party who becomes an alien enemy, though guilty of no personal turpitude, is debarred from demanding restitution of his property in a court of justice; *a fortiori*, therefore, should a person who embarks in a trade stigmatized as this has been, and denounced as a crime by authority of so high a nature.

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nature. Upon the whole, they submitted, that the vessel having illegally resisted the visitation and search of those who were duly authorized to enquire into her voyage and its objects, and having been engaged in a traffic prohibited by the laws of her own country, and contrary to the general laws of humanity and justice, ought not to be restored to the claimant.

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51 G. 3. c. 23.

After the argument had been closed, the commission of the captor was brought in. It was granted by the governor of *Sierra Leone* under the statute, and authorized the captor to seize and prosecute ships, &c. liable to forfeiture for any offence committed against the said act, or any other act of parliament passed for the abolition of the slave-trade, and found upon or near the coast of *Africa*, &c. or within the limits of any of the colonies, settlements, forts, or factories thereof.

#### JUDGMENT.

Sir *William Scott*.—This ship was taken off *Cape Mesurada*, on the coast of *Africa*, on the 11th of *March* 1816, by an *English* colonial armed vessel, after a severe engagement, which followed an attempt to escape.—The Court has found occasion to lament, that the particulars of this melancholy transaction are not more circumstantially brought to its notice ; for in the mass of matter with which these proceedings are clogged, (matter which can have no application whatever to any question that could possibly be expected to arise in the case), no information is distinctly conveyed to the Court, what preliminaries led to this unfortunate conflict ;  
in

in which no fewer than twelve lives were lost on the *British* side, and three on the other, and in which several persons on both sides were wounded. The Court is left to infer, from the general course of the transaction, that it originated in a demand to visit and search the vessel, on a suspicion of her being a slave-trader, and in a resistance to that demand; the demand and the resistance being maintained to the length of producing the calamitous event which I have described.

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The ship seized was in appearance and in fact a *French* ship, admitted both in the plea and in the argument to be so *unquestionably*, owned and navigated by *Frenchmen*, originally indeed built in *America*, and having been for a short time in *British* possession, which had ceased. She is immediately proceeded against in the vice-admiralty court at *Sierra Leone* (whither she had been carried), as a *French* ship violating *French* law by the intention of purchasing slaves for the purpose of carrying them to her port in *Martinique*. There are some words in the libel which certainly can have no consistent meaning in the sentence in which they stand, but which, if they have any meaning at all, seem to intimate vaguely and unintelligibly an ownership somewhere else than in *French* subjects. Nothing, however, appears that at all excites a suspicion that she is not what she is treated as being both by the parties and by the court, a *French* ship. For the mere circumstance of her having had *English* as well as other colours on board, cannot, in the known practice of merchant vessels, excite any such suspicion. After the admission which has been made, that she had a contingent intention

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tention at least of trading in slaves, as well as other commodities, if a convenient opportunity should offer, I feel it not requisite to enter into the detail of the many circumstances which compel that admission. The number of iron manacles on board, the construction of the platforms, the magnitude of the coppers, the quantity and quality of the provisions in store, the negociations with the natives at *Mesurada*, the mysterious passages which occur in the correspondence between the owners, all tend one way, to shew a contingent, or rather a predominant intention so to trade ; and this being admitted, the court will not deem itself guilty of any injustice in holding that the legal question is the same as if the intention were single and absolute ; for I have little doubt but that the contingency would have happened, and the opportunity would have offered, and would have been used.

At *Sierra* proceedings were commenced, which led to the first condemnation of the ship and cargo. Much argument has been employed to controvert the jurisdiction of the court upon the point of locality, which I do not think it necessary to examine for the determination of the present cause. I will suppose the jurisdiction to be duly founded, as far as the matter of locality is concerned, and consider only whether the sentence can be sustained, giving the authority which pronounced it the benefit of a supposed indisputable jurisdiction.

At the outset of the proceedings the seizor describes himself as commissioned to make *captures* and seizures. It certainly appeared to be a singular commission that authorized him to make *captures* in

No *British* act of parliament, or commission founded on it, if inconsistent with the law of nations can affect



in time of peace ; and it was therefore not an unnatural curiosity on the part of the court to desire to see it. The commission, after repeated requisitions, has been at last brought in, at a time extremely inconvenient for the purpose of any careful examination by the court, if that were necessary. It may, however, be sufficient to state that this commission professes to be issued by the governor of *Sierra Leone*, on the 25th of *January* 1816 ; to be founded on the slave-trade act, 51 G. 3. and to authorize the commander to seize and detain (for I do not find that the word *capture* occurs) all ships and vessels offending against that act, or any other act abolishing the slave-trade ; and after stating these facts to observe, that neither this *British* act of parliament, nor any commission founded on it, can affect any right or interest of foreigners, unless they are founded upon principles and impose regulations that are consistent with the law of nations. That is the only law which *Great Britain* can apply to them ; and the generality of any terms employed in an act of parliament must be narrowed in construction by a religious adherence thereto.

Upon the course of the proceedings in the Court of *Sierra Leone*, after the manner in which they have been adverted to in argument, I should desert my duty if I did not make some remark, without meaning at all to depart from that tenderness which is usually shewn to mere informalities in the practice of Vice-admiralty Courts. I have no doubt but that the gentleman under whose cognizance these proceedings passed, carried out with him, among many other laudable qualities, a proper zeal for the purposes of the establishment of *Sierra*

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*Sierra Leone* ; and I have as little doubt that he possessed a still higher zeal for his own immediate and paramount duty, the correct and equal administration of justice to all parties who might come before him. But it is impossible to deny that there occur in these proceedings incongruities, arising (as it should seem) from inattention somewhere, not only to the common forms of law, but to the rational principles on which they are founded. What was the natural as well as legal course? Surely simple and obvious enough ; for the proctor, after lodging in the registry all the papers found on board, and citing by monition the party to appear to give a libel (answering to the bill of indictment in criminal cases) stating the facts imputed, and the law that is charged to be violated, and praying the examination of his witnesses thereon, and the judgment of the Court upon the effect of the documents and testimony to be produced. The party charged has a right to give his claim, stating the facts by which he undertakes to discharge himself from all legal censure, and to produce his witnesses thereon. Upon the result of the whole evidence so furnished, and of proper special interrogatories administered under the immediate authority of the judge, the Court should pronounce its judgment. What is done here? In the first place the prize interrogatories calculated for the transactions of war are, instantly on bringing in, applied to this transaction, which, however denominated a *capture*, and with whatever fatal violence accompanied, is in truth a transaction of peace. Then, special interrogatories are administered, *non constat* by what authority, some of them

them certainly not very fairly (at least according to common notions) addressed to the persons from whom the answers are to be extracted. It is in this late stage of the proceeding that the prosecutor brings forth his libel or charge, in which he tells the judge (whose exclusive province it is to decide on the sufficiency of the proofs), that "the case is incontestably proved," both in law and in fact; the law alleged being, that the slave-trade is prohibited both by treaty, and by the internal law of *France*; and the facts charged being, that the party was trading in slaves, and resisted search. In the same benevolent view of saving the Judge the entire trouble of performing his duty, the prosecutor informs him, that "there is *no doubt* " of the ship's being fitted out for the slave-trade," and "that the evidence of the master is all " evasive;" and prays a commission of inspection to ascertain the fact of which he had just before told him that *no doubt whatever* existed, and the party is then cited by monition to appear, after the case has been thus *incontestably* proved against him; and then, without a single witness examined upon the libel, without the smallest evidence produced of the foreign law, though upon all principles of common jurisprudence, foreign law is always to be proved as a fact, the Judge having properly reduced the six counts of the libel to two, pronounces the ship to be a *French* ship, employed illegally (that is, against the *French* law,) in the slave trade; secondly, that she resisted by force the legal search of the king's cruisers; and that on both accounts herself and cargo are to be confiscated. There is, I think, considerable difficulty

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difficulty in vindicating the correctness of these proceedings, except upon the supposition, that persons charged with a concern in so odious a traffic are instantly to have a *cadut lupinum* placed upon their shoulders, and are not entitled, in the course of proceedings against them, to the ordinary forms and measures of justice. However, without pressing further observation upon the proceedings which have led to the judgment, I hasten to the more important task of considering the propriety of the judgment itself; having just stated that the grounds are two,—one, that this was a *French* ship, intentionally employed in the *African* slave-trade; the other, that she resisted by force, the king of *England's* commissioned cruizer.

A seizer cannot take advantage of discoveries produced by his own unlawful act of seizing.

Assuming the fact, which is indistinctly proved, that there was a demand, and a resistance producing the deplorable results here described, I think that the natural order of things compels me to enquire first, whether the party who demanded had a right to search; for if not, then not only was the resistance to it lawful, but likewise the very fact on which the other ground of condemnation rests is totally removed. For if no right to visit and search, then no ulterior right of seizing and bringing in, and proceeding to adjudication; and it is in the course of those proceedings alone, that the facts are produced, that she is a *French* ship trading in slaves; and if these facts are made known to the seizer by his own unwarranted acts, he cannot avail himself of discoveries thus unlawfully produced, nor take advantage of the consequences of his own wrong. Supposing, however, that it should appear that he had a right to

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to visit and search, and therefore to avail himself of all the information he so acquired, the question would then be, whether that information has established all the necessary facts?—The first is, that this was a *French* ship intentionally employed in the slave-trade, which, I have already intimated, appears to be sufficiently shewn. The second is, that such a trading is a contravention of the *French* law; for it has been repeatedly admitted that the Court, in order to support this sentence of condemnation, must have the foundation of the trade being prohibited by the law of the country to which the party belongs.

The right of visitation and search on the high seas does not exist in time of peace.

Upon the first question, whether the right of search exists in time of peace, I have to observe, that two principles of public law are generally recognized as fundamental. One is the perfect equality and entire independence of all distinct states. Relative magnitude creates no distinction of right; relative imbecility, whether permanent or casual, gives no additional right to the more powerful neighbour; and any advantage seized upon that ground is mere usurpation. This is the great foundation of public law, which it mainly concerns the peace of mankind, both in their politic and private capacities, to preserve inviolate. The second is, that all nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all states meet upon a footing of entire equality and independence, no one state, or any of its subjects, has a right to assume or exercise authority over the subjects of another. I can find

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no authority that gives the right of interruption to the navigation of states in amity upon the high seas, excepting that which the rights of war give to both belligerents against neutrals. This right, incommodious as its exercise may occasionally be to those who are subjected to it, has been fully established in the legal practice of nations, having for its foundation the necessities of self-defence, in preventing the enemy from being supplied with the instruments of war, and from having his means of annoyance augmented by the advantages of maritime commerce. Against the property of his enemy each belligerent has the extreme rights of war. Against that of neutrals, the friends of both, each has the right of visitation and search, and of pursuing an inquiry whether they are employed in the service of his enemy, the right being subject, in almost all cases of an inquiry wrongfully pursued, to a compensation in costs and damages.

With professed  
pirates there is  
no state of peace.

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With professed pirates there is no state of peace. They are the enemies of every country, and at all times ; and therefore are universally subject to the extreme rights of war. An ancient authority, the laws of *Oleron*, composed at the time of the Crusades, and as supposed by an eminent leader in those expeditions, our own *Rich. I.* represents *infidels* as equally subject to those rights ; but this rests partly upon the ground of notions long ago exploded, that such persons could have no fellowship, no peaceful communion with the faithful ; and still more upon the ground of fact that they were for many centuries engaged in real hostilities with the Christian states. Another exploded practice was that of princes granting private letters of  
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marque against the subjects of powers in amity, by whom they had been injured, without being able to obtain redress from the sovereign or tribunals of that country. But at present, under the law, as now generally understood and practised, no nation can exercise a right of visitation and search upon the common and unappropriated parts of the sea, save only on the belligerent claim. If it be asked why the right of search does not exist in time of peace as well as in war, the answer is prompt; that it has not the same foundation on which alone it is tolerated in war,—the necessities of self-defence. They introduced it in war; and practice has established it. No such necessities have introduced it in time of peace, and no such practice has established it. It is true, that wild claims (alluded to in the argument) have been occasionally set up by nations, particularly those of *Spain* and *Portugal*, in the *East* and *West Indian* seas: but these are claims of a nature quite foreign to the present question, being claims not of a general right of visitation and search upon the high seas unappropriated, but extravagant claims to the appropriation of particular seas, founded upon some grants of a pretended authority, or upon some ancient exclusive usurpation. Upon a principle much more just in itself and more temperately applied, maritime states have claimed a right of visitation and enquiry within those parts of the ocean adjoining to their shores, which the common courtesy of nations has for their common convenience allowed to be considered as parts of their dominions for various domestic purposes, and particularly for fiscal or defensive regulations more

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immediately affecting their safety and welfare. Such are our hovering laws, which within certain limited distances more or less moderately assigned, subject foreign vessels to such examination. This has nothing in common with a right of visitation and search upon the unappropriated parts of the ocean. A recent *Swedish* claim of examination on the high seas, though confined to foreign ships *bound to Swedish ports*, and accompanied in a manner not very consistent or intelligible, with a disclaimer of all right of visitation, was resisted by our government as unlawful, and was finally withdrawn.

Trading in slaves  
is not piracy.

The right of visitation being in this present case exercised in time of peace, the question arises, how is it to be legalized? And looking to what I have described as the known existing law of nations evidenced by all authority and all practice, it must be upon the ground that the captured vessel is to be taken *legally* as a pirate, or else some new ground is to be assumed on which this right which has been distinctly admitted not to exist generally in time of peace can be supported. Wherever it has existed, it has existed upon the ground of repelling injury, and as a measure of self-defence. No practice that exists in the world carries it farther.

It is perfectly clear, that this vessel cannot be deemed a pirate from any want of a national character legally obtained. She is the property not of sea rovers, but of *French* acknowledged domiciled subjects. She has a *French* pass, *French* register, and all proper documents, and is an acknowledged portion of the mercantile marine of that country. If, therefore, the character of a  
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pirate can be impressed upon her, it must be only on the ground of her occupation as a slave-trader; no other act of piracy being imputed. The question then comes to this:—Can the occupation of this *French* vessel be legally deemed a piracy, inferring, as it must do, if it be so, all the pains and penalties of piracy? I must remember, that in discussing this question, I must consider it, not according to any private moral apprehensions of my own (if I entertained them ever so sincerely), but as *the law* considers it: and, looking at the question in that direction, I think it requires no labour of proof to shew that such an occupation cannot be deemed a legal piracy. The very statute lately passed which makes it a transportable offence in any *British* subject to be concerned in this trade, affords a decisive proof that it was not liable to be considered as a piracy, and a capital offence, as it would be in foreigners as well as *British* subjects, if it was a piracy at all. In truth it wants some of the distinguishing features of that offence. It is not the act of freebooters, enemies of the human race, renouncing every country, and ravaging every country in its coasts and vessels indiscriminately, and thereby creating an universal terror and alarm; but of persons confining their transactions (reprehensible as they may be) to particular countries, without exciting the slightest apprehension in others. It is not the act of persons insulting and assaulting coasts and vessels against the will of the governments and the course of their laws, but of persons resorting thither to carry on *a traffic* (as it is there most unfortunately deemed), not only recognised but invited by the institutions

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and administrations of those barbarous communities. But it is unnecessary to pursue this topic further. It has not been contended in argument, that the common case of dealing in slaves could be deemed a piracy in law. In all the fervor of opinion which the agitation of all questions relating to this practice has excited in the minds of many intelligent persons in this country, no attempt has ever been thought of, at least with any visible effect, to submit any such question to the judgment of the law by such a prosecution of any form instituted in any Court: and no lawyer, I presume, could be found hardy enough to maintain, that an indictment for piracy could be supported by the mere evidence of a trading in slaves. Be the malignity of the practice what it may, it is not that of *piracy*, in legal consideration.

Trading in slaves  
is not a crime by  
the universal  
law of nations.

Piracy being excluded, the Court has to look for some new and peculiar ground: but in the first place a new and very extensive ground is offered to it by the suggestion, which has been strongly pressed, that this trade, if not the crime of piracy, is nevertheless *crime*, and that every nation, and indeed every individual has not only a right, but a duty, to prevent in every place the commission of crime. It is a sphere of duty sufficiently large that is thus opened out to communities and to their members. But to establish the consequence required, it is first necessary to establish that the right to interpose by force to prevent the commission of crime, commences not upon the commencement of the overt act, nor upon the evident approach towards it, but on the bare surmise grounded on the mere possibility; for

for unless it goes that length it will not support the right of forcible inquiry and search. What are the proximate circumstances which confer on you the right of intruding yourself into a foreign ship, over which you have no authority whatever, or of demanding the submission of its crew to your inquiry whether they mean to deal in the traffic of slaves, not in your country, but in one with which you have no connexion? Where is the law that has defined those circumstances and created that right under their existence? Secondly, it must be shewn that the act imputed to the parties is unquestionably and legally criminal by the universal law of nations; for the right of search claimed makes no distinctions, and in truth can make none; for till the ship is searched it cannot be known whether she is a slave-trader or not, and whether she belongs to a nation which admits the act to be criminal, or to one which maintains it to be simply commercial,—and I say *legally* criminal, because neither this Court nor any other can carry its private apprehensions, independent of law, into its public judgments on the quality of actions. It must conform to the judgment of the law upon that subject; and acting as a Court in the administration of law, it cannot attribute criminality to an act where the law imputes none. It must look to the legal standard of morality; and upon a question of this nature, That standard must be found in the Law of Nations as fixed and evidenced by general and ancient and admitted practice, by treaties and by the general tenour of the laws and ordinances and the formal transactions of civilized states; and looking to those autho-

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authorities, I find a difficulty in maintaining that the traffic is legally criminal.

Let me not be misunderstood, or misrepresented, as a professed apologist for this practice, when I state facts which no man can deny,—that personal slavery arising out of forcible captivity is coeval with the earliest periods of the history of mankind,—that it is found existing (and as far as appears without animadversion) in the earliest and most authentic records of the human race,—that it is recognized by the codes of the most polished nations of antiquity,—that under the light of Christianity itself, the possession of persons so acquired has been in every civilised country invested with the character of property, and secured as such by all the protections of law,—that solemn treaties have been framed and national monopolies eagerly sought, to facilitate and extend the commerce in this asserted property,—and all this, with all the sanctions of law, public and municipal, and without any opposition, except the protests of a few private moralists, little heard and less attended to, in every country, till within these very few years, in this particular country. If the matter rested here, I fear it would have been deemed a most extravagant assumption in any Court of the Law of Nations, to pronounce that this practice, the tolerated, the approved, the encouraged object of law, ever since man became subject to law, was prohibited by that law, and was legally criminal. But the matter does not rest here. Within these few years a considerable change of opinion has taken place, particularly in this country. Formal declarations have been made, and laws enacted, in repro-

reprobation of this practice ; and pains, ably and zealously conducted, have been taken to induce other countries to follow the example ; but at present with insufficient effect : for there *are* nations which adhere to the practice, under all the encouragement which their own laws can give it. What is the doctrine of our Courts of the Law of Nations relatively to them ? Why, that their practice is to be respected ; that their slaves if taken are to be restored to them ; and if not taken under innocent mistake, to be restored with costs and damages.—All this, surely, upon the ground that such conduct on the part of any state is no departure from the Law of Nations ; because, if it were, no such respect could be allowed to it, upon an exemption of its own making ; for no nation can privilege itself to commit a crime against the Law of Nations by a mere municipal regulation of its own. And if our understanding and administration of the Law of Nations be, that every nation, independently of treaties, retains a legal right to carry on this traffic, and that the trade carried on under that authority is to be respected by all tribunals, foreign as well as domestic, it is not easy to find any consistent grounds on which to maintain that the traffic, according to our views of that law, is criminal.

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Against the subjects of countries which have issued declarations hostile to the trade, the Courts have not unfairly applied the *argumentum ad homines*. At the same time, it is impossible not to feel (and with concern), that if the real understanding of the law, both in this country and others, is to be collected from public acts as well

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as from public declarations, it will at least be difficult to determine with certainty and precision what that understanding really is; some parts of their systems looking one way, and some another. The notorious fact is, that in the dominions of this country and others, many thousands of persons are held as legal property, they and their posterity, upon no other original title than that which I am now called upon to pronounce a crime,—every one of these instances attended with all the aggravation that appertains to the long continuation of crime, if crime it be; and yet protected by law, with all the securities that can be given to property in its most respected forms. Recent treaties with Foreign powers stipulate for a permitted continuance of this traffic to them for a course of years, and in extensive districts, and without any limitation of the numbers they may export,—that is, according to the argument that has been held, contracts for the commission of crime, without stint, throughout those districts, and during those periods of time! In such a state of law and fact, at home and abroad, it is more than difficult to arrive at the conclusion, and for this Court, representing this country, to notify such conclusion to foreign parties, that in its clear and consistent judgment of the Law of Nations upon this traffic, it is a gross violation of that law.

A declaration of persons, however eminent, assembled in congress cannot overrule the established course of the general law of nations.

Much stress is laid upon a solemn declaration of very eminent persons assembled in congress, whose rank, high as it is, is by no means the most respectable foundation of the weight of their opinion that this traffic is contrary to all religion and morality. Great as the reverence due to such autho-

authorities may be, they cannot, I think, be admitted to have the force of overruling the established course of the general Law of Nations. Suppose an equal number of foreign personages, equal in rank and station, and, if such could be found, in talents, were to declare that the right of search in time of war, as exercised on neutrals; was contrary to all reason and justice; this country, I presume, would not attribute any such effect to such opinions so delivered, even although they were not accompanied, as this declaration is, with any contemporary acts, which evinced that they were considered by the parties themselves rather as speculative opinions than as drawing after them the obligation of a public and practical conformity; for otherwise some difficulty might occur in reconciling the stipulated continuation of this traffic contained in some treaties framed at no great distance of time, with the description of its nature and quality as represented in this declaration.

It is next said that every country has a right to enforce its own navigation laws; and so it certainly has, so far as it does not interfere with the rights of others. It has a right to see that its own vessels are duly navigated, but it has no right in consequence to visit and search all the apparent vessels of other countries on the high seas, in order to institute an enquiry whether they are not in truth *British* vessels violating *British* laws. No such right has ever been claimed, nor can it be exercised without the oppression of interrupting and harassing the real and lawful navigation of other countries; for the right of search when it exists

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A nation has a right to enforce its system of navigation only so far as it does not interfere with the rights of others.

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exists at all, is universal, and will extend to vessels of all countries, whether they tolerate the slave-trade or not; and whether the vessels are employed in slave-trading or in any other traffic. It is no objection to say that *British* ships may thus by disguise elude the obligations of *British* law. The answer of the foreigner is ready, that you have no right to provide against that inconvenience by imposing a burthen upon his navigation. If even the question were reduced to this, that either all *British* ships might fraudulently escape, or all foreign ships be injuriously harassed, *Great Britain* could not claim the option to embrace the latter branch of the alternative. When you complain that the regulation cannot be enforced without the exercise of such a right, the answer again is, that you ought not to make regulations which you cannot enforce without trespassing on the rights of others. If it were a matter by which your own safety was affected, the necessities of self-defence would fully justify; but in a matter in which your own safety is in no degree concerned, you have no right to prevent a suspected injustice towards another, by committing an actual injustice of your own.

The next argument is, that the Legislature must have contemplated the exercise of this right in time of peace; otherwise they have left the remedy incomplete, and peace in *Europe* will be war in *Africa*. The Legislature must be understood to have contemplated all that was within its power, and no more. It provided for the existing occasion, and left to future wisdom to provide for future



future times. Nothing can be more clear, than that it was so understood by the *British* government; for the project of the treaty proposed by *Great Britain* to *France* in 1815, is, "that permission should be reciprocally given by each nation to search and bring in the ships of each other;" and when the permission of neutrals to have their ships searched is asked at the commencement of a war, it may then be time enough to admit that the right stands on exactly the same footing in time of war and in time of peace. The fact turned out to be, that such permission was actually refused by *France*, upon the express ground that she would not tolerate any maritime police to be exercised on her subjects, but by herself. Nor can it be matter of just surprize or resentment, that that people should be willing to retain, what every independent nation must be averse to part with, the exclusive right of executing their own laws.

It is pressed as a difficulty, what is to be done, if a *French* ship laden with slaves for a *French* port is brought in? I answer, without hesitation, restore the possession which has been unlawfully divested:—rescind the illegal act done by your own subject; and leave the foreigner to the justice of his own country. What evil follows? If the laws of *France* do not prohibit, you admit that condemnation cannot take place in a *British* court. But if the law of *France* be what you contend, what would have followed upon its arrival at *Martinique*, the port whither it was bound? That all the penalties of the *French* law would have been immediately thundered upon it. If your case be true,

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true, there will be no failure of justice. Why is the *British* judge to intrude himself *in subsidium juris*, when every thing requisite will be performed in the *French* court in a legal and effectual manner? Why is the *British* judge, professing, as he does, to apply the *French* law, to assume cognizance for the mere purpose of directing that the penalties shall go to the *British* Crown and its subjects, which that law has appropriated to the *French* Crown and its subjects, thereby combining, in one act of this usurped authority, an aggression upon *French* property as well as upon *French* jurisdiction?

An eminent  
good must not  
be procured by  
unlawful means.

It is said, and with just concern, that if not permitted in time of peace it will be extremely difficult to suppress the traffic. It will be so, and no man can deny, that the suppression, however desirable, and however sought, is attended with enormous difficulties; difficulties which have baffled the most zealous endeavours for many years. To every man it must have been evident that without a general and sincere concurrence of all the maritime states, in the principle and in the proper modes of pursuing it, comparatively but little of positive good could be acquired; so far at least, as the interests of the victims of this commerce were concerned in it; and to every man who looks to the rival claims of these states, to their established habits of trade, to their real or pretended wants, to their different modes of thinking, and to their real mode of acting upon this particular subject, it must be equally evident that such a concurrence was matter of very difficult attainment. But the difficulty of the attainment will not legalise measures that are other-

otherwise illegal. To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; to force the way to the liberation of *Africa* by trampling on the independence of other states in *Europe*; in short, to procure an eminent good by means that are unlawful; is as little consonant to private morality as to public justice. Obtain the concurrence of other nations, if you can, by application, by remonstrance, by example, by every peaceable instrument which man can employ to attract the consent of man. But a nation is not justified in assuming rights that do not belong to her, merely because she means to apply them to a laudable purpose; nor in setting out upon a moral crusade of converting other nations by acts of unlawful force. Nor is it to be argued, that because other nations approve the ultimate purpose, they must therefore submit to every measure which any one state or its subjects may inconsiderately adopt for its attainment. In this very case nothing can be clearer than that the only *French* law produced is in direct contradiction to such a notion; because approving as it does (though to a very limited extent) the abolition, it nevertheless reserves to its own authorities the cognizance of each cause and the appropriation of the penalties.

If I felt it necessary to press the consideration farther, it would be by stating the gigantic mischiefs which such a claim is likely to produce. It is no secret, particularly in this place, that the right of search in time of war, though unquestionable, is not submitted to without complaints loud and bitter, in spite of all the modifications that can be applied to it. If this right of war is imported

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into peace by convention, it will be for the prudence of states to regulate by that convention the exercise of the right with all the softenings of which it is capable. Treaties, however, it must be remembered, are perishable things, and their obligations are dissipated by the first hostility. The covenants, however solemn, for the abolition of the trade, or for the exercise of modes of prevention, co-exist only with the relations of amity among the confederate states. At the same time it may be hoped, that so long as the treaties do exist, and their obligations are sincerely and reciprocally respected, the exercise of a right, which *pro tanto* converts a state of peace into a state of war, may be so conducted as not to excite just irritation. But if it be assumed by force, and left at large to operate reciprocally upon the ships of every state (for it must be a right of All against All), without any other limits as to time, place, or mode of inquiry than such as the prudence of particular states, or their individual subjects, may impose, I leave the tragedy contained in this case to illustrate the effects that are likely to arise in the very first stages of the process, without adding to the account what must be considered as a most awful part of it, the perpetual irritation and the universal hostility which are likely to ensue.

There was no actual abolition of the slave-trade by the French law when this seizure took place.

Let it however be taken for the present, that the whole of these premises, tending to shew that no right of search upon the high seas exists in time of peace, are either unsound in themselves, or are strained to produce a conclusion that is so: I proceed to inquire how far the *French* law had actually abolished the slave-trade at the time this adventure occurred; having already observed that

that if it were not, the sentence of condemnation was admitted to be unmaintainable, and that no proof whatever of any *French* law was produced in the court below either by the exhibition of the law itself or by the information received from foreign professors and practisers of that law, or by any thing else than the mere assertion of the prosecutor in the libel. What proof is offered is brought in upon the appeal, and the question depends on its sufficiency.

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The actual state of the matter, as I collect it from these documents, is this:—On the 27th of *July* 1815, the *British* minister at *Paris* writes a note to Prince *Talleyrand*, then minister to the King of *France*, enclosing a protocol of the 15th conference, and expressing a desire, on the part of his court, to be informed, whether, under the law of *France* as it then stood, it was prohibited to *French* subjects to carry on the slave-trade. The *French* minister informs him in answer, on the 30th of *July*, that the law of the Usurper on that subject was *null and void* (as were all his decrees); but that his Most Christian Majesty had issued *directions*, that on the part of *France* “the traffic” should cease from the present time every where “and for ever.” In what form these directions were issued, or to whom addressed, does not appear, but upon such authority it must be presumed that they were actually issued. It is, however, no violation of the respect due to that authority to inquire what was the result or effect of those directions so given. What followed in obedience to them in any public and binding form? And I fear I am compelled to say that nothing of the kind followed, and that the directions must have slept in the portfolio of the office to which they were addressed; for it is, I think,

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think, impossible that if any public and authoritative ordinance had followed, it could have escaped the sleepless attention of many persons in our own country to all public foreign proceedings upon this interesting subject. Still less would it have escaped the notice of the *British* resident minister, who at the distance of a year and a half is compelled on the part of his own court to express a curiosity to know what laws, ordinances, instructions, and other public and ostensible acts had passed for the abolition of the slave-trade.

On the 30th of *November* in the same year, the additional article of the definitive treaty, a very solemn instrument most undoubtedly, is formally and publicly executed, and it is in these terms:—  
 “ The high contracting parties, sincerely desiring  
 “ to give effect to the measures on which they de-  
 “ liberated at the congress of *Vienna*, for the  
 “ complete and universal abolition of the slave-  
 “ trade, and having each in their respective domi-  
 “ nions prohibited, without restriction, their colo-  
 “ nies and subjects, from taking any part whatever  
 “ in this traffic, engage to renew, conjointly, their  
 “ efforts, with a view to ensure final success to the  
 “ principles which they proclaimed in the decla-  
 “ ration of the 8th *February* 1815, and to con-  
 “ cert, without loss of time, by their minister at the  
 “ court of *London*, the most effectual measures  
 “ for the entire and definitive abolition of a traffic  
 “ so odious and so highly reprobated by the laws of  
 “ religion and nature.”

Now what are the effects of this treaty? Accord-  
 ing to the view I take of it they are two, and two  
 only; one, declaratory of a fact, the other, pro-  
 missory of future measures. It is to be observed  
 that

that the treaty itself does not abolish the slave-trade, it does not inform the subjects that that trade is *hereby* abolished, and that by virtue of the prohibitions *therein* contained, its subjects shall not in future carry on that trade; but the contracting powers mutually inform each other of the fact, that they *have* in their respective dominions abolished the slave-trade, without stating at all the mode in which that abolition had taken place. It next engages to take future measures for the universal abolition. That with respect to both the declaratory and promissory parts, *Great Britain* has acted with the *optima fides* is known to the whole world, which has witnessed its domestic laws as well as its foreign negotiations.

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I am very far from intimating that the government of this country did not act with perfect propriety in accepting the assurance that the *French* government had actually abolished the slave-trade, as a sufficient proof of the fact; but the fact is now denied by a person who has a right to deny it; for though a *French* subject, he is not bound to acknowledge the existence of any law that has not publicly appeared, and the other party having taken upon himself the burden of proving it in the course of a legal enquiry, the Court is compelled to demand and expect the ordinary evidence of such a disputed fact.

It was not till the 15th of *January* in the present year that the *British* resident minister applies for the communication I have described, of all laws, instructions, ordonnances, and so on; he receives in return, what is delivered by the *French* minister as *the* ordonnance, bearing date only one week before the requested communication, namely, the

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the 8th of *January*. It has been asserted in argument, that no such ordonnance has yet up to this very hour even appeared in any printed or public form, however much it might import both *French* subjects and the subjects of foreign states so to receive it : how that fact may be I cannot say ; but I observe it appears before me in a manuscript form, and by enquiry at the Secretary of State's office I find it exists there in no other plight or condition.

In transmitting this to the *British* government the *British* minister observes, it is not the document he had reason to expect, and certainly with much propriety ; for how does the document answer his requisition ? His requisition is for all laws, ordonnances, instructions, and so forth. How does this, a simple ordonnance, professing to have passed only a week before, realise the assurance given on the 30th of *July* 1815, that the traffic “ should cease from the present time every where “ and for ever ? ” or how does this realise the promise made in *November*, that measures should be taken without loss of time to prohibit not only *French* colonies but *French* subjects likewise from taking any part whatever in this traffic ? What is this regulation in substance ? Why it is a mere prospective colonial regulation, prohibiting the importation of slaves into the *French* colonies from the 8th of *January* 1817 ? Consistently with this declaration, even if it does exist in the form and with the force of a law, *French* subjects may be yet the common carriers of slaves to any foreign settlement that will admit them, and may devote their capital and their industry, unmolested by law, to the supply of any such markets.

Supposing, however, the regulations to contain  
the



the fullest and most entire fulfilment of the engagement of *France*, both in time and in substance, what possible application can a prospective regulation of *January* 1817 have to a transaction of *March* in 1816?

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The counsel, fully sensible of the difficulty, have been obliged to resort, first, to the conduct of the master, whose studious concealment of his transactions argues, as they contend, his consciousness of their illegality. That from the fervour which the agitation of such questions had excited; any thing and every thing might be feared in that quarter of the globe is not at all extraordinary; but the concealment of the master, if even much greater than it is, would not, under those apprehensions, or indeed under any apprehensions, prove the existence of a law that did not exist. They are next driven to the supposition of intermediate edicts, though the *French* minister has not thought fit to produce them. I must observe, first, that the prohibition of the introduction of slaves into her colonies would be the first step that would be taken, or, as they express it, the *initiative* of any course of regulations; and, secondly, that nobody is now to be told that a modern edict which does not appear, cannot be presumed; and that no penal law of any state can bind the conduct of its subjects, unless it is conveyed to their attention in a way which excludes the possibility of honest ignorance. Surely, there is no case in which the maxim, that what does not appear is to be treated in the same way as if it did not exist, more fully and forcibly applies than one in which they have been demanded by the person who had a right to demand them, and have been withheld

A modern edict,  
which does not  
appear cannot be  
presumed.

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held by those who had a duty to produce them. The very production of a law professing to be enacted in the beginning of 1817, is a satisfactory proof that no such law existed in 1816, the year of this transaction.

It would be going further than the necessities of the present case require me to do, to say that the evidence now offered does not enable me to assert that the *French* law prohibited its subjects *from taking any part whatever in this traffic*. It is enough to say, that no law is shewn, which can have any bearing upon this transaction. The Usurper's law was *dead born* ; and if any law existed at the time of this transaction, it must be that which permitted the traffic for five years ; for the authority of that law could not be destroyed by the usurpation ; but whether it had existence or not, the seizer has entirely failed in the task he has undertaken of proving the existence of a prohibitory law, enacted by the legal government, which can be applied to the present transaction, and therefore upon that ground, as well as upon the other, I think myself called upon to reverse this judgment.

Upon the matter of costs and damages that have been prayed, I must observe that it is the first case of the kind, and that the question itself is *primæ impressionis*, and that upon both grounds it is not the inclination of the Court to inflict such a censure. If a second case should occur, it will require, (in my judgment till corrected), and undoubtedly shall receive, a different consideration.

# REPORTS

OF

## CASES

DETERMINED IN THE

### HIGH COURT OF ADMIRALTY

&c. &c. &c.

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REWARD, SELKRIG.

(Instance Court.)

**T**HIS was the case of a *British* ship, of the burthen of 162 tons, the property of *Wentworth Bailey* of the island of *Jamaica*, who, in *December* 1815, shipped at *Port Royal* in *Jamaica* about ten tons of *Saint Domingo* logwood, and twelve tons of *Jamaica* logwood, with which the vessel sailed on the 14th of that month for *Annotto Bay* in *Jamaica*, where she arrived on the 16th, landed a boat full of the logwood, and shipped forty-three hogsheads and three tierces of sugar, and one hundred and eleven puncheons of rum, with which she again sailed from *Annotto Bay* on the 31st of *December*, and arrived the day following at *Kingston*. The sugar and rum were then landed; but the market proving unfavourable, the whole of the sugar and twenty-nine puncheons of the

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Condemnation  
for breach of  
revenue laws  
by exportation  
of logwood  
from *Jamaica*,  
though de-  
scribed and used  
as dunnage.

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rum were re-shipped, the logwood remaining all the time on board. On the 15th of *January* 1816, the ship sailed from *Port Royal* with a clearance for *Norfolk* in the United States of *America*, the clearance containing no mention of the logwood. On the same day she was seized by His Majesty's brig *Emulous*, T. W. Carter Esq. commander, and brought back to *Port Royal*, where the ship and logwood were proceeded against in the Vice-admiralty Court, for a breach of the revenue laws, (particularly of the statutes 12 Car. 2., 7 & 8 Wm. 3., 6 Geo. 3., and 28 Geo. 3.), by exporting *Jamaica* logwood to the United States.

The owner at *Jamaica* gave in a claim alleging, that no breach of the revenue laws was contemplated in the exportation of the logwood; that this article was originally put on board at *Kingston*, as *ballast* for the voyage to *Annotto Bay*; that the claimant had given orders, that the logwood should be there landed, and that in fact, a large boat load was so landed, which he believed to have been the *Jamaica* logwood, as that was the last shipped; but the weather being bad, and time pressing, the master was unable to land more, and employed the remainder as *dunnage*, for the purpose of stowing the sugar and rum; for which purpose it was also kept on board at the time of the reshipment at *Kingston*, and not being considered as part of the cargo, was, for that reason only, not reported as such.

It appeared on the evidence, that the logwood, when first shipped for *Annotto Bay*, was regularly reported at the custom-house. Orders were said to have been given to land the whole of it there.

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The quantity actually taken out was  $8\frac{1}{2}$  tons, and more would have been there landed, but for the badness of the weather. The mate deposed that when the cargo was last shipped at *Kingston*, the owner came on board and told the seamen, they must keep the logwood out of sight as much as possible, and that he turned to the master, and said in a low voice, "You know logwood is a prohibited article to be exported to the United States." It was also stated, that after the seizure, the master being asked why he had not reported the logwood at the custom-house when he cleared out for *America* said, he could not do so, because it was a prohibited article.

On the other hand it appeared that the logwood actually was used as dunnage, and was not more than was necessary for that purpose; and one of the witnesses deposed that it was customary so to use logwood.

On this evidence the ship and logwood were condemned at *Jamaica* as a forfeiture, half to the crown and half to the seizer; and an appeal was now brought from that condemnation.

The *King's Advocate* and *Stoddart* in support of the sentence contended, that the contravention of the law was manifest; that it did not signify in what character the prohibited article was put on board, whether it was called cargo, or whether it was called dunnage; the fact being, that it was an article of commerce which might have been sold, had it reached its place of destination; that there was nothing in the evidence to distinguish the *Saint Domingo* logwood from the *Jamaica*; that it was not necessary to prove fraud in this case, but that

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if proof of fraud were necessary, the evidence sufficiently shewed a fraudulent intention, both by the expressions of the owner, and of the master.

*Lushington* and *Dodson* for the appellant contended that there was no credible proof of fraud; that the master merely stated the simple fact, that *Jamaica* logwood being a prohibited article, he could not report it as cargo, but that he might still employ it as dunnage. They treated the evidence of the mate as altogether improbable and undeserving of credit; and argued, that in a case where no fraudulent intention existed, it would be an extremely harsh construction of the statute to hold that it prohibited the employment of a small quantity of logwood as dunnage; for they contended that it did not appear that there was more than  $3\frac{1}{2}$  tons of *Jamaica* logwood on board at the time of seizure, and that in employing it as dunnage, nothing more was done than what was customary, according to the evidence of one of the custom-house officers who had been examined; that the importation of foreign logwood into *Jamaica*, and its re-exportation thence, was now permitted by law; and, consequently, that the Legislature could no longer deem it an object of importance to restrain the export of logwood the produce of the Island. They cited the case of the *Zeelust* in 1813, where a ship having a licence to carry corn to *Holland*, had discharged it into a lighter, which was afterwards taken as prize; but the Court restored the corn, and also 50 hides not protected by the licence, but used in the manner of dunnage to cover the corn.

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Sir *William Scott*.—This is a case in which I do not feel myself authorized to disturb the sentence of condemnation which has taken place in the Court below. The major part of the cargo on board at the time of the seizure has not been proceeded against; but the vessel and 13½ tons of logwood are the subjects of appeal. This logwood is described as dunnage, and appears to have been so employed on board the ship. A part of it is certainly the produce of *Jamaica*; but whether 3½ tons or 1½ tons, or any intermediate quantity, does not appear. Whatever was the quantity, it could not legally be exported to the United States. The law had imposed an absolute prohibition. Something has been said on the policy of the law, and it has been observed, that as some late acts permit the importation of foreign logwood into *Jamaica*, and its re-exportation thence, the restriction of the export of *Jamaica* logwood can be no very important object in the contemplation of the legislature; but with such considerations as these, I have nothing to do. This Court is not at liberty to controvert the policy of existing prohibitions. If they are unwise, they are not to be corrected here. If they have become inconvenient by a change of circumstances since their first enactment, application must be made to the legislature to remove that inconvenience. This Court cannot take on itself legislative functions: it must administer the law as it stands; certainly, with such qualifications as the law permits. The Court is not bound to a strictness at once harsh and pedantic in the application of statutes. The law permits the qualification implied

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implied in the ancient maxim *De minimis non curat lex*.—Where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a mere trifle, which, if continued in practice, would weigh little or nothing on the public interest, it might properly be overlooked. In the present case, the exact quantity is not easily to be ascertained. It has been argued, that it did not amount to more than three tons. Three tons of fraud perhaps would not be what the Court could regard as a mere trifle. I think, on the evidence, the quantity of *Jamaica* logwood on board was probably greater. A part was certainly foreign, but how much cannot now be determined. Upon the whole, the Court cannot take upon itself to say, that the quantity of the prohibited article was so trifling as to fall properly within the protection of the legal maxim before adverted to. I think it exceeds that amount; but I must look a little further. What is here alleged is, that this is the usual practice of *Jamaica*. Now, in my mind, this, instead of alleviating the strictness to be exercised, ought to augment it; for, if a practice so abusive prevails generally at that island; if every ship that sails from *Jamaica* may take three, four, five or six tons of an article, the exportation of which is absolutely prohibited by law, what becomes of the prohibition? The judge of the Vice-admiralty Court at *Jamaica* (a gentleman of very considerable talents, and of singular judgment in the exercise of his functions) seems to have done perfectly right in putting a check to this practice. If it be true, as has been stated, that dunnage is difficult



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difficult to be procured at *Jamaica*, this may be a very proper ground for an application to the legislature to relax the prohibition, but cannot justify the individuals in taking on themselves a breach of the law as their general custom. It must be remembered, that this logwood, though used as dunnage, was still a saleable article, and might be disposed of. I think it does look as if there were somewhat of a custom like that which is here alleged in the way of excuse, the conversation between the master and the custom-house officer bears pretty much that inference; but if so, it is high time that the custom should receive the check which it has received by the present condemnation.

It has been argued, that it is a case entitled to particular favour, from the absence of all fraud; and that it is clear there was no intention to violate the law. I do not enter into that question. It is sufficient if there is a contravention of the law; if there is *fraus in legem*. Whether that may have arisen from mistaken apprehension, from carelessness, or from any other cause, it is not material to enquire. In these cases it is not necessary to prove actual and personal fraud. Certainly there are some points in the evidence which seem to show that the owner was conscious that the act in which he was engaged, required concealment; and where there is concealment and clandestinity in such matters, they cannot be wholly free from a suspicion of fraud.

If the law is contravened, proof of fraudulent intention is not necessary.

Reference has been made to a licence case adjudged in the prize court. There is little analogy between those cases in general, and revenue cases. In the licence cases the principal object was the relaxation of a general prohibition to trade with

Revenue cases subject to considerations different from licence cases.

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the enemy, and (except in some particular instances) the particular nature of the article traded in was considered by the government granting the licence as immaterial. Therefore the Court thought itself at liberty to construe the permissions of the licence with such latitude as seemed to be consistent with the intention of the grantor. The case is widely different in a prohibition of municipal law, and where that prohibition turns entirely on the nature of the article. There are many other considerations distinguishing all that class of cases from this class : in fact they are founded on different principles.

I am of opinion that here was a distinct breach of the law by exportation of saleable goods, call them dunnage if you please, they may be cargo nevertheless : and it must be presumed that they were going to be converted into money.

The Court affirmed the condemnation, but without costs.

## NAPLES GRANT.

ON the 13th of *May* 1815, certain *Neapolitan* ships of war and stores were surrendered to *Robert Campbell* Esq., captain of His Majesty's ship *Tremendous*, in pursuance of a convention of that date, entered into between General Prince *Cariati*, on behalf of the government of *Naples*, and the said *Robert Campbell*, senior officer of His Majesty's vessels in the *Bay of Naples*, on behalf of His Majesty.

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Questions arising upon grants of the nature of prize, when referred to this Court, must be considered on the principles of prize.

These ships and stores were afterwards restored to the *Neapolitans*, by order of His Majesty's government, without any proceedings having been insituted against them.

On the 18th of *June* 1816, in consequence of a motion made in the House of Commons, it was resolved, "That a sum not exceeding £150,000  
" be granted to His Majesty, to be distributed to  
" the officers, petty officers, seamen, and marines,  
" under the command of Captain *Robert Campbell*,  
" at the capture of *Naples* on the 13th day of  
" *May* 1815, for ships and stores then taken  
" from the enemy, and restored to the *Neapo-*  
" *litan* government; and that the said sum be issued  
" and paid without any fee or other deduction  
" whatsoever."

In *December* 1816, a memorial of Sir *Charles Burrard* Bart., late commander of His Majesty's brig *Grasshopper*, was presented to the Lords of the Treasury, setting forth the grounds upon which  
he

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he considered the *Grasshopper* to be entitled to participate in the vote of Parliament, and soliciting their Lordships to recommend to His Majesty, to include the memorialist and the rest of the officers and crew of the *Grasshopper* in any grant that might be made, or any warrant or order issued for payment of the money so voted by Parliament.

On the 10th of *February* 1817, a warrant, under the sign manual of His Royal Highness the Prince Regent, was issued, directed to the Lords of the Treasury, signifying His Royal Highness's pleasure, that they should pay, out of any of the aids or supplies granted to His Majesty for the service of the year 1816, unto Sir *John Jackson* and Captain *Jeremiah Coghlan*, the sum of £150,000, upon trust, to be distributed to the officers, petty officers, seamen, and marines, under the command of Captain *Robert Campbell*, at the capture of *Naples*, on the 13th day of *May* 1815, for ships and stores then taken from the enemy, and restored to the *Neapolitan* government, agreeably to the Royal Proclamation for the Distribution of Prizes, and subject to the sanctions and penalties of the Prize Act.

It was afterwards signified to Sir *Charles Burrard*, that the Lords of the Treasury declined taking upon themselves to determine on his claim, and referred him to proceed in such manner as he should be advised.

On the 16th of *April* 1817, the Proctor for Sir *Charles Burrard* addressed a letter to the trustees under the warrant, requesting them to authorize His Majesty's Proctor to appear on their behalf,  
to

to the usual process of the High Court of Admiralty, and submit to its jurisdiction for determining the merits of the claim of the *Grasshopper*.

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The trustees having signified their assent to this application, the case was brought before the Court in the usual manner.

#### JUDGMENT.

Sir *William Scott*.—This case arises on the construction of a grant of the sum of £150,000, voted by Parliament to be distributed to the officers, petty officers, seamen, and marines under the command of Captain *Robert Campbell*, at the capture of *Naples*, upon the 13th day of *May* 1815, for ships (three in number, two of which were in port and one upon the stocks), and also for stores taken from the enemy, and restored to the *Neapolitan* government; and for ascertaining how this sum should be paid, it is referred to this Court.

A question has been raised, or rather insinuated than actually contended for, that the Court is not to consider this *as of the nature of prize*, but that the claims of the parties are to be considered upon principles of a more enlarged nature. Now *prize* it certainly is not, nor from the terms of the surrender can it be considered *as legal prize*; at the same time it may be considered *as a grant of the nature of prize*; and although not measured with exactness with respect to the amount of the substitute for the property, (for which the money in question is substituted), or the quantum of force employed, yet it is nevertheless for a service, and the surrender of ships produced by force. It is to be distributed *as prize money is distributed* among the officers,  
petty

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petty officers, seamen, and marines; and being referred to this Court, which is a court of *prize*, I apprehend that it was the intention of those from whom that reference proceeds, that it should be considered upon the *principles of prize*.

It does not belong to this Court to interpret grants; this Court cannot wander into general interpretations of the kind; but if it be a grant of the nature of prize, it comes naturally under the consideration of this Court, which leaves the general interpretation of grants to a jurisdiction of another nature.

Looking to the reference in this case, I am bound to consider it upon the principles of prize, disregarding the invitation made to the Court to enter upon a more enlarged consideration and feeling of liberality in favor of the claimant, in attending to which the Court might be in some danger of losing its way.

These are the terms that may be applied to the nature of the grant.

Upon every consideration, therefore, I must confine myself to the principles upon which decisions on prize interests are governed, which are principles of rational liberality.

The question arises on a demand in the name of His Majesty's brig *Grasshopper*, which claims to be entitled to share as a joint-captor, as being concerned in the common service of capturing (if I may use the word) certain vessels; and the principle on which both sides have argued is that in which the law concurs, namely, that in order to vest an interest in a vessel which is engaged in the

To be entitled to share as joint captor, vessel must have been present at some period of the operation by which the capture was effected.

the common service in a blockade, or in naval or military operations of that kind, it must be shewn that such vessel was present at some period of the operation, either at the commencement, the intermediate stage, or at the time of the surrender. I do not mean to lay down any such universal or negative or exclusive principle, in which it can be said, that there may not be cases in which an interest may arise upon something falling short of this; but the rule is severe, and it cannot be in general denied, that where a vessel of war associated with others is present at any part of a war-like transaction, be it blockade, siege, or whatever it may be, that, by being present at any part of it, and more particularly if combined in the service of the operation, such vessel is fairly entitled to the interest which she claims. In order to determine, then, whether the *Grasshopper* may be brought within this limitation of the right of prize, it may be proper to consider the occurrences which took place in this business. They are contained in some degree in the allegation offered on her part, which to a great degree proves itself; the facts which it asserts being exhibited in orders and instructions, and as there is no reason to presume that they were not as expressed, I may take them, as far as they go, to be a fair exposition of what did occur.

Four witnesses only are examined, and I cannot assent to the observation of the King's Advocate, that these are interested witnesses; there is only one of them who may be considered in that character, namely, Mr. *Start*; but neither Lord *Burg-*  
*hersh*

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Semble that an interest may arise on something falling short of this general rule.

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*hersh* nor Captain *Dickson* can be considered in that light ; the latter of these officers was on board the *Rivoli*, and not in the *Grasshopper*.

It is stated in the allegation, that upon the 28th of *March* His Majesty's brig the *Grasshopper*, under the command of Sir *Charles Burrard*, was lying at anchor in *Genoa Mole*, together with the *Tremendous* and other vessels. That Sir *Charles Burrard* received an order from Captain *Campbell*, (a general order), whereby he was directed to place himself under his command, and accordingly he was placed under his command at the time of the order exhibited, which bears date upon the 30th day of *March*. The allegation proceeds to state that the government of *Naples* being favorable to the usurpation of the crown of *France*, and hostile to the policy of *Great Britain*, various communications passed between Captain *Campbell* and the Commander in Chief of the *British* land forces ; and it was determined by them that every assistance should be given to the *Austrian* army then advancing towards *Naples*, (which is the sole fact, I think, to which Lord *William Bentinck* speaks) ; that Captain *Campbell* being desirous of informing himself of the marine force of the *Neapolitan* government, and also the disposition of the *British* naval Commander in Chief, as to the prosecution of hostilities, did, upon the 11th day of *April* 1815, by an order in writing in *Leghorn Roads*, direct Captain Sir *Charles Burrard* to proceed off *Naples* and touch at certain ports in the way, to see if any of the enemies men of war were lying there, and not meeting with any, he was to proceed and endeavour to fall in with His Majesty's ship  
*Rivoli*,



*Rivoli*, then to proceed to *Palermo*, and to deliver dispatches to the Commander in Chief, and in his way to touch at ports where *British* Consuls were residing, in order to inform them of the existing circumstances between *Great Britain* and *Naples*, and to observe due caution in approaching any ship whatever, and to take notice of the movements of hostile troops and vessels. The order is exhibited, and then the narrative goes on to state that the *Grasshopper* proceeded to execute that order, and arrived in *Palermo Bay* on the 18th of *April*, and there found the *Partridge* at anchor in the Bay. That on the 21st of *April* Sir *Charles Burrard* received an order in writing from Captain *John Millier Adye*, senior officer in the Bay, requiring him, in consequence of a requisition of merchants at *Palermo*, to proceed with the sloop or brig under Sir *Charles Burrard's* command off the port of *Naples*, and cruise there for one week, from the time of making the land, and at the expiration of such time to return to *Palermo*. The 8th article states that he did execute this order, and that upon the 30th of *April* the *Grasshopper* being in the *Bay of Naples* fell in with His Majesty's ship *Tremendous*, and that Captain Sir *Charles Burrard* went on board that ship with the orders he had received from Captain *Adye*; and Captain *Campbell* observed, that, as the period for his (Sir *Charles Burrard's*) cruising had expired, he should, pursuant to the directions of the Commander in Chief, take him under his orders, and the *Grasshopper* was accordingly directed to take the station which His Majesty's ship *Rivoli* had just left, which was to cruise off the northern passages of the Bay

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*Bay of Naples.* He did so, in company with the *Tremendous*, under the command of Captain *Campbell*, from the 30th of *April* to the 6th of *May*, for the purpose of watching and of blockading the said port.

Now, I agree with the observation of the King's Advocate, that it would have been better, perhaps, if the blockade had been more specifically described; it turns out to be not so much a blockade of *Naples*, as a blockade of certain ships in the *Bay of Naples*. It would have been better if it had been more precisely explained. However I do not *remember any objection being made to that on the admission of the allegation.*

There is matter enough in the evidence to fill up that fact, and sufficiently explain the application of the blockade, which I think appears to have been a blockade of the ships in the *Bay of Naples*, to prevent their egress for any purpose of hostility, either offensive or defensive in any manner; the *Rivoli* being there to prevent their issuing from the northern passage, and the *Tremendous* and other vessels being stationed upon the southern outlet to prevent their egress on that side.

The history goes on to relate that during the absence of Sir *Charles Burrard* at *Palermo*, Captain *Campbell*, leaving His Majesty's ship of war *Tremendous* at *Leghorn*, proceeded to *Florence* to communicate with the *British* minister there as to the prosecution of the war against Marshal *Murat*, then chief of the *Neapolitan* government, and for the assisting and co-operating with the army of the allies advancing towards the *Neapolitan* territory. And in consequence the said Captain *Campbell* having rejoined his ship, proceeded to cruize in the

the *Bay of Naples*, to blockade two ships of the line of the *Neapolitan* government.

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And there is the material evidence of Lord *Burghersh* upon that point; for he says, that at *Leghorn* he saw Captain *Campbell*, whom by letter dated the 10th of *April* he had authorised to commence hostilities against the *Neapolitans*. The first arrangement was to protect *Leghorn* by the naval force in co-operation with the land forces. That he afterwards proceeded (a change of circumstances having taken place) to the head quarters of General *Nugent*, the commander in chief of the *Austrian* and *Tuscan* forces in *Tuscany*. And he upon his arrival there wrote to Captain *Campbell*, desiring to see him at *Florence*, to make the necessary arrangements for the employment of the *British* force under his command, in co-operating with the *Austrian* army against the *Neapolitan* states. It was upon the 18th of *April* that Captain *Campbell* arrived in *Florence*, and the arrangement made between him (Lord *Burghersh*) and Captain *Campbell* was general; it was, that he should do what? why, “that Captain *Campbell* should employ the force under his command to blockade the *Neapolitan* ships of war in the *Bay of Naples*.” That is the first service which was to attract his attention. “To create alarm in the *Bay of Naples*,” and “to give assistance to the *Austrian* army, which was advancing by the coast road upon the *Neapolitan* territory, and to keep up the communication with the *Sicilian* expedition assembled at *Melazzo*.” But the first service was certainly that of blockading the ships of the line lying in the *Bay of Naples*.

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The allegation goes on to state, "that having  
" rejoined his ship, Captain *Campbell* proceeded to  
" the *Bay of Naples* to blockade two ships of the  
" line of the *Neapolitan* government lying in the  
" mole of the port of *Naples*, and to co-operate  
" with the *Austrian* army in the capture of *Naples*,"  
echoing exactly what is described to have passed  
in the arrangement as agreed upon between Lord  
*Burghersh* and Captain *Campbell*.

The allegation also states, that during such  
cruise His Majesty's ship *Tremendous* was on the  
30th of *April* joined by the *Grasshopper*, and  
Captain *Campbell* was desirous to communicate  
with the *Austrian* commander; and upon the 6th of  
*May* he verbally ordered Sir *Charles Burrard* to  
proceed in the *Grasshopper* to *Terracina* with a  
letter, which he accordingly did.

The 11th article states, that on the 7th of *May*  
Captain *Campbell* proceeded to blockade the *Bay*  
of *Naples* and the ships there, and having under  
his command the *Tremendous*, *Alcmene*, and the  
*Grasshopper* (although it was not personally present),  
he sent a flag of truce into *Naples*, informing the  
government, that unless it surrendered the ships  
of war and stores, he should proceed to bombard  
the town. That upon the 9th of *May* he made  
sail after a strange vessel, which stood in towards  
*Naples*, but afterwards altered her course in a  
contrary direction. That Sir *Charles Burrard*  
was proceeding to return to his station in the  
morning of the 9th of *May*, and being distant  
from the land about five miles, he observed a  
strange sail, which turned out to be the vessel  
which Captain *Campbell* was in chase of, and  
he took the opportunity of firing broadsides into  
this

this strange frigate, and in company with the *Tremendous*, the *Grasshopper* pursued this sail under the walls of *Gaeta*.

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It does not appear that the *Grasshopper* did at this time proceed into the *Bay of Naples*.

The next article states, that the ships before *Gaeta* were joined by the sloop *Partridge* (upon the 9th of *May*), which had arrived with dispatches from Lord *Exmouth*, directing Captain *Campbell* not to molest the *French* flag; and the strange frigate which was chased into *Gaeta* having carried that flag, Captain *Campbell* apologised by letter to the *French* captain for having so done: an order was accordingly given by Captain *Campbell* to Sir *Charles Burrard*, directing him to proceed and deliver a letter, with a flag of truce, to the *French* frigate at *Gaeta*, and afterwards to proceed to *Terracina* and communicate with the *Austrian* army, and giving them all possible assistance, he was instructed to return to Captain *Campbell*, off *Naples*: all of which was regularly executed. He went with this letter of apology to the *French* frigate: he communicated with the *Austrians* at *Terracina*, and returned again to the *Bay of Naples*; where he did not arrive, undoubtedly, till after the surrender had been made, in consequence of the message which was so sent in upon the 8th of *May*. When he came there, he found that the surrender had been actually made; and therefore, as it appears to me, the question in this case is, at what time this blockade must be considered to have commenced? and whether from that commencement, His Majesty's ship *Grasshopper* can be pronounced to have been present, and much more to have been active in it?

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deemed the  
commencement  
of a blockade.

It seems to me to have been assumed in this case, that the commencement was at the time at which the summons was sent in ; and that the termination of it was at the time of the actual surrender. And I entirely agree with Dr. *Arnold*, that if that is to be taken as the time of the actual blockade of the bay, that the title of the *Grasshopper* is entirely ousted ; and I entirely agree in the statement, that the *Grasshopper* was not in the *Bay of Naples* at that time, nor at the time of the summons, nor upon any of the intermediate days, nor at the time of the surrender ; and therefore, if that be taken as the point of law, that the time of the summons and surrender is to be so considered, then the *Grasshopper* is not to be so entitled. But it strikes me, that *that* is not by any means to be considered as the commencement of this blockade ; but that the moment these ships were assembled to stop the egress of the vessels in the bay is to be considered the commencement of it. And, if the *Grasshopper* were there during any part of that time (and she appears not only to have been present, but contributing to that operation), she comes then under the ordinary qualification of prize interest.

Now, upon what ground is it to be assumed that the blockade is to be taken to have commenced from the time the summons was sent in ? Is that so ? The summons is usually the conclusion of the business ; after the parties have taken their positions, and have made their advances, and have sounded the dispositions of the persons who are the objects of attack : but the blockade or siege commences long before that time.

Let

Let us see the situation of the *Grasshopper* at that antecedent period.

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Captain *Dickson*, who is perfectly disinterested, says, to the 8th article of the allegation, that the deponent, after his arrival off the *Bay of Naples*, continued some time in company with Captain *Campbell*, the two ships under their commands being jointly engaged in blockading the two line of battle ships in that bay. How long they were there he does not say, but it was probably a week or ten days. After that time, it was agreed that they should separate, and that deponent should take a more northerly situation, to intercept the line of battle ships should they proceed that way. When the deponent was proceeding to the northward of *Ischia*, an island near the *Bay of Naples*, he fell in with and captured a *French* frigate, and was proceeding with his prize to *Palermo*, when the *Grasshopper* came up, and Sir *Charles Burrard* came on board the *Tremendous*, (where the deponent was making a report); when there he does not recollect whether any orders were given by Captain *Campbell* in his hearing, but something was said as to the situation which the *Grasshopper* should occupy; and he knew that it was under the orders of Captain *Campbell*, and he understood it to be settled when he left them, that the *Grasshopper* should continue under his orders, and take a station to windward, so as to co-operate in blockading the bay. He says further, that the *Grasshopper* did not take exactly the station which the *Rivoli* had left, which would be dangerous for the *Grasshopper*, being of inferior force.

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Now this account is confirmed by Mr. *Starr*, who was on board the *Grasshopper*, and speaks to the same point. And I do not apprehend it is capable of contradiction or denial, when he says this, that this ship was after the 30th of *April* in the *Bay of Naples*, and was contributing its force to the blockade of those vessels ; and therefore it cannot be contended, unless you can reduce the commencement of the blockade to a much later period, namely, at the moment when the summons was sent in, it cannot be contended, I say, but that the *Grasshopper* was present and assisting at the blockade ; taking it that it had commenced at the time of the summons ; that she joined when the *Rivoli* went away, she was engaged upon the common principles of prize, which give it to vessels that assist in any part of the operation. Upon these principles this vessel is entitled.

I think the blockade is sufficiently proved, and that it existed before the time when it is said to have commenced on the other side ; perhaps it was commenced under other views, namely, with a view of obtaining the capture of these ships, not of dealing with them pacifically, when the blockade commenced, but being rendered so by the events which followed, namely, the approach of the *Austrian* army upon the land-side, the enemy was willing to accept of the *British* custody of these vessels. The relations between this country and *Naples* were certainly such as those which Lord *William Bentinck* and Lord *Burghersh* have intimated, and if a hostile force could have been sent before, it would have been so done. It acted



acted at that time only by preventing the egress of the vessels in question, but that operation connected itself in point of fact with every thing that followed, and led directly to the ultimate event of which the blockade was the commencement. I am therefore of opinion, that the *Grasshopper* is entitled to the judgment of this Court.

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## WARRIOR, PEACHE.

(Instance Court.)

May 2d, 1818.

The Court of Admiralty is not permitted to entertain questions of disputed title, but it still retains jurisdiction over causes of possession.

**THIS** was a cause of possession, brought by *Matthew Boyd* of *Camberwell*, in the county of *Surrey*, the original owner of this ship, against *Joseph Dyson Woodhead*, the present possessor, asserting himself to be the owner of the ship, under a purchase made by him at the *Isle of France* from *Robert Berry*, the agent of *Matthew Boyd* at that place.

## JUDGMENT.

*Sir William Scott*.—This case originated in an application to the Court by *Mr. Boyd* to be put into possession of a vessel, which appears to have been clearly his property ; it being a *British* built vessel, and purchased by him in the month of *January* 1815, for the sum of £4,200 under a regular bill of sale, and with every other requisite formality. The person in whose possession it now appears, is a *Mr. Woodhead*, who asserts himself to be the legal proprietor ; and in support of his title, produces a bill of sale from *Mr. Berry* of the *Isle of France* to himself, and an indorsement on the register to the same effect. On the part of *Mr. Boyd*, it is contended that the pretended transfer from *Mr. Berry* is altogether fraudulent, and that the property being still vested in him, he is entitled to recover possession of it under the authority of this Court. A question is now raised whether the Court has authority to decide upon the

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the validity of a title founded upon a bill of sale ; a question which, I cannot help thinking, might have been raised in an earlier stage of these proceedings. It is certainly true that this Court did formerly entertain questions of title to a much greater extent than it has lately been in the habit of doing: In former times, indeed, it decided without reserve upon all questions of disputed title, which the parties thought proper to bring before it for adjudication. After the Restoration, however, it was informed by other courts, that such matters were not properly cognizable here; and, since that time, it has been very abstemious in the interposition of its authority. The jurisdiction over *causes of possession* was still retained; and although the higher tribunals of the country denied the right of this Court to interfere *in mere questions of disputed title*, no intimation was ever given by them that the Court must abandon its jurisdiction over *causes of possession*.

A question of title may occur incidentally in a cause of possession, and it then becomes necessary for the Court to enquire into the title, at least so far as to satisfy itself that it may safely decree possession to the party seeking it. It cannot be laid down that the Court is to decline its jurisdiction in a cause of possession, on the mere averment of one of the parties, that there is a conflicting claim of title. If the mere averment of title, without any examination into its foundation, would be sufficient to arrest the progress of a cause, the jurisdiction of the Court over cases of possession would be ousted altogether. It would be idle to say that the Court retained its jurisdiction, if

A question of title may occur incidentally in a cause of possession.

To what extent the Court may then enquire.

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if the moment a warrant was extracted by one party, the other was at liberty to put an end to the suit, by asserting a title, resting, perhaps, on no foundation whatever. The nature of the title must be shewn before it can be permitted to have the effect of arresting the cause in its progress. It must be made to appear that it is not a mere cobweb title that is set up, but that it is such as to raise a real and substantial doubt to whom the property belongs; and, in that case, the Court would certainly decline to interfere as to the possession, until the title should have been determined upon by the courts in which such questions have been more usually agitated in the modern practice of the law.

Subject to these observations I proceed to enquire into the circumstances of the present case. The transaction itself took place in a very remote quarter of the globe, and the person more particularly engaged in the transfer of the vessel, I mean *Mr. Berry* who sold it, is still there, and probably knows nothing of any of the proceedings in this cause. How then can the Court expect to have that full and satisfactory information which it might have obtained in an inquiry into any domestic transaction. *There* all the parties interested in the inquiry would have been at hand to explain and defend their own conduct. But in this case it is quite otherwise. *Here* I am called upon to decide upon the conduct of a person who is absent, against whom there is a direct charge of fraud, and who has no opportunity of being heard in his defence. *Mr. Berry* is the person who actually made the sale of the ship; all the papers were drawn up,

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up, and every thing was done by his advice and under his direction. If therefore there be fraud in the case, he is one of the most guilty of those concerned in it. I am then, in fact, trying his conduct in his absence; and it must be a very strong case indeed that would induce me, under such circumstances, to determine that the sale was invalid on the ground of fraud. It appears that *Boyd* was certainly the owner of this vessel, that he repaired her at a very considerable expence, that he sent her out to the *East Indies* under the care of *Peache* as master, of whom he knew but little, but of whose character he had received a good report. The master sails with instructions from Mr. *Boyd*, which are drawn with sufficient accuracy as far as they go, but I do not find that they contain any directions for his conduct in case of distress or emergency. If any event of that sort should occur, he is left with no other guide for his conduct than the law, which law is the dictate of reason and good sense only. The vessel sails to the *Cape of Good Hope*, and from thence to the *Isle of France*, consigned to Mr. *Berry*, with whom it appears that *Boyd* was not personally acquainted, but whose character he had, according to his own account, long known, and to whom he had been recommended in the strongest and most flattering terms. The authority which was confided to Mr. *Berry* was of a very large description: for it appears that he was not only entrusted with the disposal of the outward cargo, but with a discretionary power to purchase a new one; and that he was also invested with the power of displacing the master, if he should think fit to do so. From the correspondence which afterwards took

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took place, it should seem that Mr. *Boyd* himself was in some measure dissatisfied with the conduct of *Peache* as master, but whether justly so or not the Court is not now to question. The powers given to Mr. *Berry* certainly do not extend to the sale of the ship, nor is any mention made of the circumstances under which a sale might be deemed advisable. But no such event was in the contemplation of Mr. *Boyd*. He appears to have been satisfied with Mr. *Berry*'s mode of employing the vessel; though in one of his letters he certainly expresses some surprise that she should want repairs, having so recently been refitted. The ship had been chartered to bring cattle from the *Island of Madagascar* to the *Mauritius*, and had been navigating under a *French* master and crew; not in consequence of any misconduct on the part of *Peache*, but merely on account of the nature of the trade, with which the *Frenchmen* were supposed to be better acquainted. According to the protest of the *French* master, the vessel met with bad weather and suffered considerably in her last voyage between *Madagascar* and the *Mauritius*; and there seems no reason to doubt the truth of the account given by him, for he could have no interest in exaggerating the damage which the vessel sustained. The vessel was then returned into the hands of the *English* master, and stood in need of repairs. The question is, how are these to be obtained? What is the captain to do? For I must advert to the situation in which the man was placed, in a remote part of the world without any instructions from his owner applicable to such circumstances. Common sense as well as the law points out that he should

should in first place apply to the agent of the owner, which it appears that he did. If the agent cannot or will not assist, and if himself and his owner are without any other friends who are ready to come forward and furnish him with the necessary supplies, what can he do better than to make application to the Court of Admiralty? In some parts of the world the authority of such courts is deemed conclusive, though it certainly has been otherwise held by the courts which possess the controlling power within the *British* territories. But the want of such jurisdiction I have heard greatly regretted by some of the eminent persons who now preside in those Courts. What is the manner in which the master conducts himself in this particular case? Why in the first place he applies to Mr. *Berry*, the agent of his owner, and it is not denied that this was the best course he could have pursued. But Mr. *Berry*, it appears, refused to grant him the necessary supplies. It is said, that this is strange conduct on the part of Mr. *Berry*, and that he ought not to have refused, as he had money in his hands belonging to Mr. *Boyd*, which he might and ought to have applied for the use of the ship. Supposing the fact to be as represented, that *Berry* had money of *Boyd's* in his hands, I should say so too. If *Berry* had been heard and had not been able to assign a sufficient and satisfactory reason for acting as he did, I should be of the same opinion. But *Berry* has not been heard; he is not here to explain how things really stood. It is possible, and not improbable, that he might have money of *Boyd's* in his hands, but it is by no means certain that he had ;

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had ; and it must be recollected, that, at this particular time, a great calamity had occurred at the *Isle of France*, which had very much impeded business of every kind, and had to a great degree suspended all cash payments. It is possible that *Berry* might have the expectation of receiving money on *Boyd's* account ; but admitting that the fact was so, that he had an expectation, a prospect of getting some money of *Boyd's* into his possession, still I am not aware that an agent is bound by the law-merchant to advance money for the use of his principal, on the expectation of receiving it back at some unknown and uncertain period of time. If the fact, therefore, were proved, that he actually had such an expectation, it would be somewhat harsh in the absence of the party to conclude that he acted improperly in refusing to supply the master from his own funds. The fact however, is certain, that whether rightly or not, he did refuse to advance the money. What then was the master to do under such circumstances ? He does, what in my opinion was extremely proper, makes an application to the Vice-Admiralty Court, which I have no doubt acted with proper attention to the case. It certainly does not precisely appear from any of the proceedings of that Court, that it was informed of the applications which had been previously made to Mr. *Berry*, and that he had declined to supply the money. But I must presume that it had a knowledge of this circumstance ; for it is impossible to suppose that it would have acted as it did, unless it had possessed information to this effect. The Court directed that endeavours



should be used to raise money upon bottomree, and it is proved that this measure was attempted, but without success, and indeed it is probable that the state of the island rendered this more difficult of accomplishment than it would otherwise have been. The Court then directed that a survey should be made of the vessel; and, if I had perceived that improper persons had been selected for the performance of this duty, I should think very differently of that Court than I am now disposed to do. But the persons appointed by the Court as surveyors, do not appear to have acted otherwise than with the greatest propriety; for, although an attempt has been made to impeach their conduct, there does not appear to be any ground of charge against them. It is sworn indeed by two persons, one of whom is very young, that the master desired them to represent the ship to be in as bad a state as possible, and not sea-worthy; but this can hardly be true, for the surveyors were not to depend upon the account given them by others, but upon an actual survey made by themselves. The surveyors report that the sum necessary to be expended on repairs to make the ship fit to take a cargo to any part of the world, would amount to 20,000 dollars. The Court then declared that all had been done that was proper. What could the Court do more? It could not make the survey itself; and having taken care to select proper persons and received their report, to which no objection was taken, it had done all that was necessary. The ship was then ordered by the Court to be sold, and she was accord-

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accordingly put up to auction ; but as a small sum only was bid, the master thought proper to buy it in for the sum of 7,500 dollars. Upon this the master again applies for instructions to Mr. *Berry*, who recommends him to dispose of the ship by private contract. It is said that the master ought to have gone back to the Court for further directions, that he ought to have applied for an order to sell the vessel publicly for whatever she would fetch, and certainly this would have been the most regular mode of proceeding ; but, although it does not appear that any application of this sort was made to the Court, it is by no means impossible that it might have been. A private sale of the vessel then takes place, and if it had been for a smaller sum than what had before been publicly offered, I should have been inclined to suppose that the sale might have been fraudulent ; but here the agreement was for a sum considerably larger than what had before been offered, which is a strong circumstance to shew the absence of fraud. If there be fraud in the business, Mr. *Berry* must be the principal agent in it, for every thing is done by the master under his authority and direction. High testimonials are produced in favour of the character of Mr. *Berry*, and he is accredited by Mr. *Boyd* himself in his letters, and indeed by the very employment of him as agent and consignee. Who is the purchaser ? Why not a person belonging to the island, and likely on that account to have any favour shewn him, but Mr. *Woodhead*, who had just arrived from the *Cape of Good Hope*, where he happened to have some wine and other goods lying,

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lying, which he wished to send to *England*. I see no proof of fraud in this purchase thus made from Mr. *Berry*. It is not satisfactorily proved, that he had any money belonging to the owner in his hands. The master certainly had none; money was not to be got upon bottomree. What could be done better than to sell the ship for the most that she would fetch? Mr. *Woodhead* purchases her, not from the captain, but from Mr. *Berry*, who was the agent, not appointed for sale certainly, for that was not in the contemplation of the owner, nor were the circumstances that might lead to a necessity for the sale. It is said that the ship was not repaired to the extent of the report made by the surveyors; but that is in part accounted for, by the circumstance of Mr. *Woodhead's* having merely repaired her so far as to make her fit for the voyage to *England*. Can I then take upon myself to say, that this purchase by Mr. *Woodhead*, has been made under such circumstances of fraud, as would justify me in pronouncing it to be null and void, and to order the vessel to be restored to the original owner? Certainly not. It appears that the master afterwards purchased one-third share of this vessel from Mr. *Woodhead*. In this he acted imprudently, and certainly should have abstained from so doing. But this is not such a circumstance as would altogether impeach the fairness of the transaction; especially as it was *Berry*, and not the master, who transferred the vessel to *Woodhead*. If the sale of the vessel by Mr. *Berry* was not fraudulent, the subsequent sale of a part of it must also be free from fraud; at least, as far as the original owner

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was concerned. It is enough for me to say that the transaction is not shewn to be clearly fraudulent, which alone could justify the Court in pronouncing it to be altogether void. I do not feel myself authorized therefore to transfer the possession from the purchaser to the former owner.

## CYGNET, KIDD.

**THIS** was the case of a *Spanish* cargo taken on board a *British* ship by an *American* privateer, and afterwards retaken by a *British* vessel of war, and brought to this country. At the time of the capture and recapture, war subsisted between *Great Britain* and the United States of *America*, but *Spain* was in amity with both those powers. Restitution of the ship was decreed on salvage, and the cargo was sold under a decree of the Court. A claim for the proceeds of the cargo was afterwards given on behalf of some *Spanish* subjects, when the judge pronounced for the claim, directed seven-eighths of the proceeds to be restored to the claimants, and reserved the adjudication of the remaining eighth, together with the question of salvage.

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Stipulation by treaty, "that free ships should make free goods," does not warrant such a certain conclusion, "that enemies ships should make enemies goods," as to induce the Court to decree salvage for the recapture of property, otherwise neutral, on board British ships.

*The King's Advocate* and *Dodson* on behalf of the recaptors cited the treaty of commerce entered into in the year 1795, and still subsisting between *Spain* and the United States of *America*, and contended that the cargo having been taken on board an enemy's ship would have been liable to condemnation in an *American* court of prize. By the treaty it was stipulated that free ships should make free goods, (*vide Laws of United States of America*, vol. 2. p. 526), from which stipulation it was fairly to be inferred that enemies ships should make enemies goods.

*Arnold* and *Adams* for the claimants denied that the inference contended for could fairly be

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deduced from the stipulation referred to in the treaty, and submitted that the claimants were entitled by the general law of nations to restitution without payment of salvage.

The Court was of opinion, that the mere argument of inference did not warrant such a certain conclusion, and decreed restitution to the *Spanish* claimants, rejected the claim of the recaptors for salvage, and refused to allow their expences.

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## JUDGMENT.

Sir *W. Scott*.—This is a question of *head-money*, arising out of the destruction of five *French* ships of war, in the memorable engagement at *Aix Roads*, in the year 1809. They and other vessels had been long blockaded by a fleet under the command of Lord *Gambier*; and an attempt was at length proposed to destroy as many as could be reached by means of fireships, assisted of course by the blockading squadron. This attempt was carried into execution on the night of *April* the 11th, and in the following day, with the effect of destroying the five ships, at least as far as the present question is concerned. The head-money was applied for on the part of the fleet, and it was granted; but the distribution was prevented by a notice, which was given, on the part of Lord *Cochrane*, to the agent of the fleet not to distribute. In consequence of this proceeding, a monition was taken out, calling upon Lord *Cochrane* to show cause why the head-money should not be distributed among the fleet in general; and it is in answer to this monition that his lordship appears and shows cause, the effect of which it is for the Court now to consider.

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Head-money due to the whole blockading force, and not to the fireships only which were more immediately employed in the destruction of the enemies ships.

Some complaint has been made, that the present mode of proceeding is disadvantageous to his lordship. If it be so, the objection comes too late. In the beginning it was open to his lordship to have

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Benefit of head-  
money re-  
stricted within  
narrower limits  
than that of  
prize.

adopted a different course, and at a later stage it was open to him to have represented to the Court any inconvenience to which that course had subjected him, and the Court would have given the matter another shape. But both parties have been content to go on in the course originally taken, and any complaint upon that matter now comes too late to be entitled to attention.

This being a question of head-money, it is to be admitted that it certainly has been the habit of this Court, supported by a consentaneous practice on the part of the superior court, to restrict the benefit of *head-money* within much narrower limits than that of *prize*, or property taken from the enemy. In the case of the latter property, it is well known that the benefit has travelled to a much greater distance, by means of an enlarged interpretation of the word "taken," carrying the application of that word to an extent probably not within the contemplation of those who first used it. It has been extended so as to include, with few exceptions, all ships of force within visual distance, though perhaps otherwise unconnected with the act of capture, and even unconscious of its occurrence ;—a rule, which falls hard in many particular cases affecting the interest of meritorious captors, but which is supported by the equity of an universal application, giving possibly an equal benefit to the same meritorious captors in other cases, where, but for this same rule, they would take no benefit at all.

Sight alone not  
sufficient to  
give title to  
share in head-  
money.

In the distribution of head-money, the bounty of the state itself, and not the fruit of fortunate acquisition, a much stricter principle has been applied.



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applied. It is considered more as a reward for real and active service, and for meritorious personal exertion, though not very prominently called for by the mere textual expressions of the statute. It is not shared with those who have no title but that of the casual sight of a transaction in which they had no immediate share. It is not even an honest and anxious endeavour to share in the peril that shall bring the parties within the extent of the beneficial title, if the endeavour does not bring them within the capacity of actual sharing in that peril. If two ships of war, otherwise unconnected, chase, and the one comes up and fights and captures, before the arrival of the other, the latter is not held entitled, because she had not, though using her best endeavours, brought herself within the sphere of action. But if she had so done, and only refrained from actually mixing in the fight then terminating, because the force immediately applied was already more than was necessary, and the addition of any more could only have injured the value of the property in contest, or produced an useless effusion of blood, and if such a state of facts were clearly established to the satisfaction of the Court, the Court would not consider that the party who withheld the use of his force upon such considerations only, being otherwise perfectly ready and disposed to combat, was disqualified from taking an interest in the head-money pronounced for thereon. The Court has gone still further; and, upon principles from which it feels no disposition to recede, it has pronounced for the interest of a vessel, which had not been shown with any degree of certainty to have arrived within

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In a general  
engagement all  
are entitled to  
share in head-  
money, without  
particular atten-  
tion to particu-  
lar merits or  
sufferings.

gunshot. Such was the case of the *Weser*, in which the *Rippon*, a large ship of force, was called in to assist two others which had contended a long time in vain with the enemy. On the appearance of the *Rippon*, the *Weser* surrendered at once : and although there was no further action, the immediate submission was held to entitle the *Rippon* to share in the head-money.

In the case of an united force, acting for a general purpose, I take the rule to be, that it is a conflict of all with all. In point of fact, particular ships must and will be engaged, at particular times during the engagement, with particular ships ; but as the co-operation and conflict are both general, and it may be hardly possible to distinguish the particular combats that take place in the course of a long mixed engagement, which is varying its face every moment of its duration, it is considered by the law as throughout the combined effort of every one against every one, without particular attention to particular merits or sufferings. In the battle of *Aboukir*, one ship, which gallantly led the way into action, grounded upon a shoal, and was prevented by that accident from taking any further share in that memorable engagement. That ship, I presume, shared in the head-money : at least I am confident that this Court would have felt no hesitation in pronouncing for her interest, any more than for that of any other ship which had been disabled in the course of the action. It may happen, and I have reason to believe often does happen in fact, that in general engagements ships which are mutually engaged recede to a great distance from the general fleet, and far out of its sight ;

sight ; but that elongation does not at all affect the unity of the transaction ; it is still a general engagement, and the ship belonging to the superior party, whether successful or not against her particular opponent, shares with all the rest of the body of the fleet in the fruits of the general triumph of the day.

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The rules therefore as to head-money differ widely as they regard claims arising out of general engagements, and as they regard those which are founded on particular combats : and in questions respecting that title, it is very necessary to distinguish to which class the case in question is to be referred. If to that of particular combat, it must be shown that the claimant has directed his force to the particular object in the requisite degree : not so, if founded on something of the nature of general engagement. There it is only necessary to show that the claimant composed a part of the general body ; that he was present within a sufficient distance to have given assistance still more active, if required, to that part of the common force which was immediately employed ; that he was present, giving not a remote encouragement, but an immediate support, to the enterprise, as far as it was necessary for him so to do. It might happen, as it most certainly does in the present instance, that the active use of the whole force might be on many accounts extremely unadvisable ; that the space for such an employment might, on account of its limits, be attended with much inconvenience and risk ; that the use of one description of the component force might be more proper to sustain only an auxiliary and protecting part, though

Rules respecting head-money differ widely as they regard claims arising out of general engagements, or of particular combats.

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though equally necessary to the success of the general enterprise ; that the disposition of the whole force combined for the general purpose rested with the skill and discretion of the commander, who had assigned to each portion its proper station ; that such a station had been assigned to the claimant in that transaction ; and that the duties imposed upon him by such an assignment of station, whatever they were, had been adequately performed. If such be the character fairly attributable to the transaction, it will subject the case to the rules that apply to a combined force acting in the nature of a general engagement. If not—if it is to be understood upon the common principles applied to a separate force, or to a force that must be considered as acting separately, it must be considered less favourably for the fleet in this instance ; for it has been established to the entire satisfaction of the Court, assisted in its judgment by gentlemen of the Trinity House, that the fleet never approached within gunshot of the scene of action. At no period did the *Caledonia*, and the ships immediately associated with her, do so ; and therefore they could with great difficulty, if at all, support a claim to head-money for ships captured by other vessels, unless upon principles that in no degree belong to unassociated ships.

The questions proper to be considered, in order to determine this case, are therefore—

1st. Whether these were the transactions of a fleet originally associated for one common purpose, to which these transactions immediately relate ?

2dly. If so, whether a severance and dissociation was produced by any occurrence afterwards, at any period

period at which the fleet could be excluded from the benefit that it would have taken, if it had continued in its original united character ?

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The first question refers necessarily to the origin of the transaction ; and I think it cannot be doubted but that it must have been in the mind and intention of the blockading force, which had been long so employed, to reach these *French* ships if possible. To imagine otherwise would be just as rational as to suppose that any animal of prey surveys its object without a wish beyond that of the mere contemplation. In the act on petition, as originally drawn on the part of Lord *Cochrane*, it was expressly alleged, “ That an expedition was formed, *under the orders of Lord Gambier*, for the purpose of capturing or destroying the *French* ships which he had been blockading in *Air Roads*.”—“ That this expedition consisted of the line of battle ships, the frigates, sloops of war, gun-brigs, bomb-vessels, fireships, and explosion-vessels, schooners, and cutters, taking in the whole of the fleet, great ships and small, under Lord *Gambier*’s command.” From this description, one would imagine that there was no intention to contest the facts, not only that this expedition was intrusted to Lord *Gambier*, but likewise that it was executed by the general fleet under his command. But it proceeds to the details of the attack on the 11th and 12th of *April*, in a description that purports to confine at least the execution of the attack to a particular set of vessels which were more immediately and actively employed ; and concludes with a prayer that does not go even to that extent, for it desires the Court to direct the distribution to be made to the *Imperieuse*,  
the

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the ship commanded by Lord *Cochrane*. However, it has since been stated upon affidavits that this account had been hastily and somewhat inaccurately drawn up in Lord *Cochrane*'s absence, and without communication with him : and the account stated by Lord *Cochrane* himself, in his reply to Lord *Gambier*'s answer contained in the act, contradicts *in toto* the account originally given in on his behalf. For Lord *Gambier* having stated in his answer that the *French* fleet being actually blockaded, it became a matter of deliberation between him and the captains of the ships of the line, with whom he occasionally advised, what might be the best method of effecting the destruction of the *French* fleet ; and that as it appeared to them that the only mode of so doing would be by the use of fireships, a communication to that effect was made to the Lords of the Admiralty, and the adoption of such means was accordingly resolved upon by their lordships. All this is expressly contradicted by Lord *Cochrane*, who denies, in the most unreserved terms, that the destruction of the *French* fleet by fireships became a matter of deliberation between Lord *Gambier* and his captains, or that the Lords of the Admiralty resolved upon it in consequence of any communication from Lord *Gambier* ; and asserts that the whole project originated in communications made to their lordships by Lord *Cochrane*, excluding, by this account, Lord *Gambier* from all participation in the origin as well as in the execution of the whole matter.

On looking into the letters which Lord *Cochrane* produces from the Admiralty, I confess that this latter statement does not appear to me to be borne out

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out by them. The first in order of time is a letter from Lord *Gambier*, dated the 11th of *March* 1809, some time before Lord *Cochrane* had any communication with the Admiralty on the subject. In this Lord *Gambier* speaks of “bombarding the enemy’s fleet,” and of “making an attempt to destroy it;” clearly evincing that such an attempt had come at least under his own deliberation, though he was not at that time very sanguine in expectations of its success; for he goes on to say, “the enemy’s ships lie very much exposed to the operation of *fireships*: it is a horrible mode of warfare, and the attempt very hazardous, if not desperate; but we should have plenty of volunteers for the service.”

The next letter is from Mr. *Pole*, the Secretary of the Admiralty, to Lord *Gambier*. It is dated on the 19th of *March*, the very day that Lord *Cochrane* arrived at *Plymouth* in the *Imperieuse* from the *Mediterranean*, at which time he received a communication by telegraph from the Admiralty, requiring his attendance in *London*. This letter begins by informing Lord *Gambier* that the Board of Admiralty had ordered twelve transports to be fitted out as *fireships*, to proceed and join him off *Rochefort*; that Mr. *Congreve* was also under orders to join him with a large assortment of rockets; that the bomb-vessels were fitting with all possible expedition to proceed to the same destination; and that all these preparations were making with a view to enable him, Lord *Gambier*, to make an attack on the *French* fleet at their anchorage off the *Isle d’Aix*, if practicable; directing *him* to consider the possibility of effecting it, either conjointly with his line of battle ships, frigates,

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frigates, small craft, fireships, bombs, and rockets, or separately by any of these means: and in the postscript Mr. *Pole* says, “the fireships are expected to sail from the *Downs* to-morrow, and the rocket ship from the *Nore* about the same time.” Here, therefore, is an entire delegation of discretion and command to Lord *Gambier* for the special purpose of this transaction, and means actually furnished to him for its execution, in whatever mode he might deem most expedient; and all this before the Lords of the Admiralty had had any communication whatever on the subject with Lord *Cochrane*, as far at least as I am enabled to discover. There may have been other communications with his lordship, of which I know nothing; but I can only judge from the evidence submitted to me, and such is the evidence which these letters brought in by Lord *Cochrane* on affidavit afford.

The next letter is of the 25th of *March*: and in the interval Lord *Cochrane* had come up from *Plymouth* to *London*, and had had an interview with the Lords of the Admiralty. Mr. *Pole* herein says to Lord *Gambier*, “My Lords Commissioners of the Admiralty have thought fit to select Captain Lord *Cochrane* for the purpose of conducting, *under your lordship’s directions*, the fireships to be employed in the projected attack of the enemy’s squadron off *Isle d’Aix*.”

On the 26th of *March* Lord *Gambier* writes to Mr. *Pole*, acknowledging the receipt of his letter of the 19th, and says—“The enemy have taken their position apparently with the view not only to be protected by the strong works upon the *Isle d’Aix*, but also to have the entrance of the *Charente* open  
to



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to them ; that in case of being attacked by *fireships*, and other engines of that kind, they may run up the river beyond the reach of them."

Upon a general view of these documents, I think nothing is clearer than that the command of the whole enterprise was originally committed to Lord Gambier, Lord *Cochrane* having, under Lord Gambier, the subordinate command of the fireships, which now composed a part of the blockading force. He states, that he joined *the blockading force* ; of course he became a part of it : and I need not repeat an observation, which I think universally admitted, that there is no occupation which so completely unites, and, as it were, identifies the vessels engaged in it, as that of blockade. In its very nature and essence it is constituted by that association, and does not exist without it. Suppose that the enemy, in the interval before the attack, had attempted a sortie for escape, and had been captured, Lord *Cochrane* would have shared. Suppose any other part of the blockading force had by a successful *coup de main* effected a capture of any of the *French* ships, Lord *Cochrane* would have shared. The attack did not take place till the night of the 11th of *April*. What had preceded ? Doubtless many consultations respecting the safest and most practicable mode of execution ; for that had not been settled by the Admiralty, but had been entirely referred to the judgment, not of Lord *Cochrane*, but of Lord Gambier, and those whom he chose to consult upon the spot, whether it should be by fireships alone, or by them, associated with other descriptions of force. Indeed I presume that fireships alone could not have effected

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effected the purpose to the extent that was wished. They could not be expected to destroy all these ships, and hardly to *capture* any of them, though capable of taking such preparatory steps as might facilitate the full execution of these important objects. How had the fleet itself been employed in the interval? Had it been an idle but anxious spectator of the preparation of the fireships for a detached and insulated service, with which the fleet had nothing to do? Impossible. Here was a fleet nearly equal to themselves in force, protected by many defences, both natural and artificial, by shoals, by batteries, by dangerous passes, and other means which gave them great additional security and advantage; and that a parcel of fireships, unaided and unsupported by other force, should achieve the destruction of such a fleet, must have been an exploit beyond the dreams of romance itself, even if all these fireships had been ready prepared, and equipped, and manned. But the fact was otherwise; for the fleet itself had to create a large proportion of this very force, by converting the provision transports into fireships, and afterwards manning them with both officers and men. Why, it is said, the conversion was mere carpenter's work! But it was done by those who were only carpenters *pro hac vice*, for the very purpose in view; and it is idle to say that you might as well pronounce for the interest of the carpenters in the dockyard, who are not fighting men, who are employed as mere mechanics, without any view to the immediate service on which the ship is to be sent, or to themselves having any concern at all in it, beyond the mere construction of the vessel. And

as

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as to the manning, with as little truth can it be urged that in such a case as this it amounts to nothing, because in cases of a totally different nature it has been held that a ship cannot commission as many boats as it chooses to send out voluntarily and without necessity. Suppose the whole fleet had been embarked in these fireships and boats and launches, excepting such a number as might be left on board for shipkeepers; would this Court not have held that their services entitled the fleet? Suppose a smaller proportion, but still selected from the fleet, this Court would have considered it as the act of the fleet. The ships that came from *England* composed, after their junction, a part of the fleet: the others were the creatures of the fleet, supplied with men, with arms, with officers, with every thing that could render them effective put on board these vessels, only because they could be there employed with much greater advantage than in their own more usual stations.

That Lord *Cochrane* may have had particular merit in framing the plan for the advance of the fireships on the 11th, which is, I think, distinctly admitted by Lord *Gambier*, and likewise in the invention of explosion vessels, claimed by Lord *Cochrane*, and not denied by any other person—these are grounds which will not exclude the legal interests of other parties, whose merit may have been of a less signal nature; for in all such cases the proportions of personal merit, however differently distributed, produce no difference whatever in the distribution of the legal interest arising therefrom: and it must be remembered that whatever Lord *Cochrane* projected could not have

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been carried into effect, unless it had received the sanction of Lord *Gambier's* approbation ; whence-soever suggested, it is by his authority it takes place.

Hitherto the service, united in its origin, retains the same character. Does it depart from that character in its subsequent stages? On the night of the 11th the attack takes place, and with signal success; for, without the loss of one man on our part, the whole of the enemy's fleet, except two ships of the line, are driven on shore—and this by the act of the fireships alone ; for the boats and launches, though put in a state of preparation by Lord *Gambier's* orders, had no occasion to act, and not having such occasion, the boats were, on account of the inshore wind, suspended by tackles, the others moored by hawsers. At the same time it is not to be contended, that this service on the part of the fireships was a detached and insulated service. The boats and launches had been prepared, and, though thus secured, were in a state ready to act in three minutes ; the frigates took an advanced position to receive and protect the boats on their return from the fireships ; and the fireships (as I have had occasion to observe) were themselves parts of the fleet, not despatched on a separate and distinct service, but aided and supported in such degree as was necessary for this part of the combined operation which more peculiarly belonged to them. No severance—the fireships did what was proper for them to do under the orders of the commander of the fleet, and in preparation for such further acts of hostility as might more properly belong to other component parts of that fleet to effect.

The

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The next morning early discovered how well these fireships had executed their task, having driven on shore the whole of the enemy's fleet, except the *Foudroyant* and the *Cassandra*: and then preparations were made by other ships of war, under orders and signals from Lord *Gambier*, to proceed and take their share in the execution of this combined enterprise; and more fireships were sent to assist in attacking the *French* ships lying ashore. At a later hour the main fleet itself approached, as near as the commander in chief judged expedient, for the purpose of affording such aid and assistance to the further operations as might be requisite. Meanwhile several of the *French* ships were actively employed in warping themselves off, which they effected in the course of the day. The *Ocean*, the *Foudroyant*, and the *Cassandra*, which had taken an excellent position to defend the anchorage, slipped their cables at the approach of the fleet; so that this important removal, which made an opening for *British* vessels, was entirely attributable to the body of the fleet itself. The *Cæsar* was early in action; the *Imperieuse*, *Valiant*, *Revenge*, and *Indefatigable*—all these ships were sent in by direction of Lord *Gambier*, not of Lord *Cockrane*. A mixed and confused engagement then took place, the first part of which was undoubtedly between the *Imperieuse* and the *Calcutta*, which latter ship was certainly subdued by the *Imperieuse*, but had not formally surrendered to her; for she was abandoned by her crew, and destroyed by *Stokes* from the *Caledonia*, after the men sent from the *Imperieuse* had been dislodged by the fire from other *British* ships poured upon them

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them through the confusion which prevailed. Whether or not one ship began or completed her conflict before another is a matter of no consequence, if this be considered as a general engagement. Whether the whole of the fleet was engaged, or only a part, is equally so, if, in the judgment of the commander in chief, the work could be better effected by a part than by the whole:—a very possible case under many circumstances that may occur, and actually the case under such as did appear to the commander in chief to occur in the present instance. Here was no small confusion with the number of ships that did enter; and it was for the discretion of those who governed the transaction to determine whether more should enter, under all the difficulties and inconveniences which might endanger their safety, and render victory itself not worth the purchase. Lord *Cochrane* seems to have entertained a different opinion, and “repeatedly called for more assistance from the fleet,” holding out as an encouragement that “half the fleet would destroy the enemy;” thereby manifestly admitting that the fleet was in a situation to give effectual assistance, and that he looked to that assistance for support. Being not given otherwise than in the form in which it had been already given, I am bound to conclude, that the judgment of the commander in chief did not concur in the necessity or propriety of the requisition so made.

In adverting to this circumstance, I think it not unnecessary to observe, that there are in the affidavits several charges intimated, of rather a criminating nature, against the commander in chief,  
as

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as not having answered proper signals, and not having performed the whole of the duty which circumstances enabled him to perform for the benefit of the state ; in short, as having been in several respects a defaulter in the public service. To observations of that kind I can pay little attention, for they are the proper subjects of another jurisdiction. There was a time when this Court possessed the sole and exclusive jurisdiction over them. That jurisdiction has very fortunately been transferred from it by the institution of naval courts martial ; and this Court would now be extremely cautious in determining a question of mere civil interest upon grounds that imputed failure of duty or deviation from it to officers placed in high situations of naval command. In the present case it would be peculiarly improper, because the question of conduct has been directly submitted to the proper tribunal ; and, as I understand, that tribunal has dismissed the charge, and justified the skill and discretion with which the whole transaction was directed throughout. I am therefore compelled to take it, that the command was properly exercised in all respects ; not omitting to observe, that the very charge imports an admission that Lord *Gambier* was the actual commander of this enterprise ; for upon what other ground could he be made responsible at all for any thing that occurred in the conduct of it ?

Many other circumstances tend to support the conclusion that this must be fairly considered as a joint enterprise, in which all concurred, though in very different degrees of hostile activity. It is not always the degree of hostile activity that determines

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the conflict. In the case of the *Rippon*, it is perfectly clear that it did not. That ship, of much superior force, had hardly arrived within gunshot, and had not fired a shot, when the enemy, which had beat off the former combatants, who had called in the *Rippon*, struck his colours, and yielded a submission which their efforts could never have compelled. It is therefore by no means accurate to lay it down universally, that intimidation and encouragement are out of the question. They are certainly out of the question, so far as concerns the general presumption raised by the mere construction of the law, that they necessarily operate on every presence; but if the matter does not rest there—if it is proved in fact that they *did* operate, and compelled a surrender which would not otherwise have taken place—to say, that because they did not actually fire they are not entitled, is what cannot be maintained upon any other principle than such as ought to exclude all title to head-money in every case in which the enemy submitted without resistance to a superior force. Nobody, I presume, would contend that you cannot have head-money without a battle for it. The utmost length to which the Courts have gone is this—that if there has been a battle, they will not raise the presumption of intimidation from mere presence, as in cases of prize. A ship unassociated must show a concurrence by actual proof of engaging in the combat, or of having actually contributed mainly to produce a surrender by her appearance at the scene of action. In this case, there has been a contribution of endeavours on the part of the fleet that goes much beyond mere sight and presence.

Every



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Every ship engaged is a member of the fleet at the time of action, and is so engaged by the directions of the commander of the fleet. How is the connexion broken? Not by elongation of distance; for that often takes place in general engagements to a much greater extent. Not by being detached on a distinct service, for the whole fleet is instant and imminent, and, with all its attentions and all its energies, as far as necessary, concentrated in the pursuit of this one object—not by being placed under a separate command, for the controul and superintendence remain entirely with Lord *Gambier*. Different degrees of activity are assigned by him to different ships; for it would be inconvenient to them all to act in the same place, and upon the same scale of effort; but all are contributing in those degrees to the general operation. The number and quality of the ships mixing immediately in the contest are determined by him. They are sent in successively as the occasion appears to mature and to require co-operation. On board the ships so sent in (the inshore squadron, as it is called) there are the usual traces of a battle,—Returns of killed and wounded. The fleet that staid behind is looked to by Lord *Cochrane* for assistance and support as that which is co-operating. He is of opinion that he did not receive all that ought to have been afforded, and that had half the fleet been sent in, it would have effected the whole purpose. Those are opinions on which the other jurisdiction has decided in a way that excludes any judgment of mine upon such a question. I am bound to take it, that as much was done as was proper to be done,

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and by all the means that were proper so to be applied. The other ships fled up the *Charente* by throwing overboard their guns and heavy stores ; and this, I am to presume, could not be prevented by any efforts which a sound discretion should direct. Then how stands the whole of this matter? An expedition originally confided, in the material parts of its plan, as well as of its execution, to Lord *Gambier*—carried throughout under his care and superintendence—every movement directed by him—every situation assigned by him—every part of the business, principal or auxiliary, executed by ships which were as much members of his fleet as the *Caledonia* herself—from the beginning to the end, no interruption of command or association.

————— Servatur ad imum  
Qualis ab incepto —————

To this view which I take, it adds a great corroboration, that it appears to be the view which every one else takes of it who has no interest in taking another. The opinion of the *British* fleet may be supposed to be produced or influenced by concurrent interests of their own. But what shall be said to the captured witnesses of the *French* fleet, attributing the disastrous events of the night and day to the fleet under the command of Lord *Gambier*? They have no interest in this matter of head-money. What shall be said to the inshore squadron, who have all the same interest as the *Imperieuse* to deny the title of the fleet; but to them it never occurs to claim any title either to glory or profit from this transaction, but in partnership with the fleet. These are strong indications of what was dictated by common reason, and by common

common and just feeling upon the subject, and certainly lend no small confirmation to the more artificial conclusions of law upon it. With respect to the cases that have been cited and commented on, I don't think it necessary to enter into them minutely. I know of no general doctrine, nor of any particular *dicta*, that, being fairly weighed, can be considered as adverse to the opinions I have intimated. Those that relate to unassociated ships are all foreign to the present question, which I take to arise entirely upon the footing of a combined enterprise, connected in its origin, and carried on throughout, without any breach of continuity in its progress, to its termination. If I am wrong in this view of it, I am wrong altogether in the foundation of my judgment; but I think I am warranted and compelled by the facts to assume it, and to decide by that assumption the disputed interests.

The Court accordingly pronounced against the cause shown by Lord *Cochrane*, and in favour of the right of the whole fleet to share in the head-money.

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## GENEROUS.

### JUDGMENT.

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Revenue cases  
are usually  
transmitted in a  
very incommo-  
dious form from  
the Vice Ad-  
miralty Courts.

Sir *W. Scott*.—This case (a revenue case) comes from the Vice Admiralty Court of the island of *Barbadoes*, and is transmitted in the very incommodious form in which such cases usually travel from the Vice Admiralty Courts. The proceedings are there instituted, referring to all or a great number of the navigation laws, and alledging, that upon a violation of *all*, or *some* or *one* of them, the property ought to be condemned. The judgment of the Court pronounces a general sentence of condemnation, if the property is deemed liable to condemnation upon any ground, but without any specification transmitted here of the particular ground on which it has been so held ; and of course the drudgery is imposed upon those who have to conduct these appeals in this Court, and on the Court which has to review the judgment, of hunting through the whole body of statutes enumerated, in order to find out, conjecturally, on which ground the condemnation passed. If it be necessary or proper (as it may be) to enumerate all these statutes in the initiation of the cause, in order that the Crown may have the benefit of any criminal fact that may be disclosed upon the evidence that is to follow, it is, I think, no unfair expectation on the part of this Court, that it should appear in some form or other in the conclusion of the cause, what the particular facts were on which the Court below arrived

arrived at that legal conclusion ; otherwise this Court and its practisers are driven to the necessity of travelling through a body of laws and a collection of facts that may be foreign to the real foundation of the judgment, and which had been dismissed out of all consideration by all parties, as totally irrelevant to the real subject of controversy. It would be a great relief and satisfaction to this Court if this intimation of its wish should meet with more attention in the proper quarters than it has hitherto had the good fortune to receive.

It is a case upon the revenue laws — a system, as it has been rightly observed, of a very unbending nature, framed for the protection of great interests, and upon very jealous views of preventive policy, and this policy is to attend it in its actual administration. It is not the private opinion of the judge upon the policy that is to guide his public judgment ; he must follow where the law leads, in a general unbending course. But the law itself, and the administration of it, must yield to that to which every thing must bend — to necessity. The law, in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling them to impossibilities ; and the administration of law must adopt that general exception in the consideration of all particular cases. In the performance of that duty it has three points to which its attention must be directed : In the first place, it must see that the nature of the necessity pleaded be such as the law itself would respect ; for there may be a necessity which it would not. A necessity created by a man's own act, with a fair previous knowledge

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The system of the revenue laws is of a very unbending nature, and the clearest proof of necessity is requisite to excuse a violation of them.

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knowledge of the consequences that would follow, and under circumstances which he had then a power of controuling, is of that nature. Secondly, that the party who was so placed used all practicable endeavours to surmount the difficulties which already formed that necessity, and which on fair trial he found insurmountable. I do not mean all the endeavours which the wit of man, as it exists in the acutest understanding, might suggest, but such as may reasonably be expected from a fair degree of discretion and an ordinary knowledge of business. Thirdly, that all this shall appear by distinct and unsuspected testimony; for the positive injunctions of the law, if proved to be violated, can give way to nothing but the clearest proof of the necessity that compelled the violation. Subject to these observations, we enter upon the facts of the case.

The ship was seized at *Barbadoes* immediately on her arrival there in *July* 1816. The history (as appearing in the evidence) is, that she had been the *French* ship *Genereux*, taken on the capture of that island; that she was purchased, after condemnation at *Barbadoes*, by *John Lawless*, residing at *Guadaloupe*, who chartered her to *Forman*, another merchant, late *resident* there, for 9000 dollars, to carry a cargo of island produce to *Wilmington* in the *West Indies*, from thence to bring *American* produce to *Barbadoes*, and then return home to *Guadaloupe*. It is alledged that a person named *Gibson* was the supercargo of the whole adventure out and home; that *John Nixon* was the master appointed to command her at *Guadaloupe*, but that another master, *Peregrine*, was appointed to supersede

sede him at *Wilmington*, on account of imputed misconduct, by the supercargo, who had powers for such a purpose. The ship sailed to *Wilmington*, and on her return voyage to *Barbadoes*, as admitted, was seized, having on board a crew not composed of qualified persons under the navigation acts, and therefore subjecting herself and cargo to confiscation, unless it can be shewn that some necessity, which the party could not remove, had produced this acknowledged violation of the law. The *fact* is not controverted; it remains therefore only to see how it is justified and excused. Another objection is made, of less moment, that the captain's name, upon the change at *Wilmington*, was not duly registered, which I shall reserve for a short distinct consideration. The justification set up is this, — that a qualified crew could not, by any possibility, be obtained at *Guadaloupe*; and that the deficiency could not be supplied afterwards. This very plea admits that she sailed with an insufficient crew of qualified persons from *Guadaloupe*; because it would be perfectly absurd and ridiculous to say, as you do, that it was absolutely impossible to procure a proper crew, and to maintain at the same time that you had such a crew on board. The two assertions cannot stand together. The fact of an insufficient crew is necessarily implied in the very plea of justification, unless you claim for yourselves the talent of conquering impossibilities. In like manner you say, in your sworn claim, that it *was wholly and altogether impossible* to obtain a *British* master at *Guadaloupe*; and yet you affect to hold out, that a *British* person, by name *Nixon*, was on board this ship as its master, and is so described in all its documents.

These

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These two assertions can only be reconciled by the supposition, that though on board as master, he was not the real master, — a supposition which on further inquiry will turn out to be the fact. After such a plea it is idle to say that what passed at *Guadaloupe* is out of the present question, for you have made it the very foundation of your defence; viz. the apparent deficiency of your crew at *Barbadoes* was owing to the impossibility of procuring a competent number at starting from *Guadaloupe*; and three out of your four witnesses speak to nothing else. If indeed you had shewn that you had started with a competent crew from your own domestic port of *Guadaloupe*, and that the deficiency was produced by desertions in a foreign port, that might have availed you so as to exclude any question respecting *Guadaloupe*; but that is not your defence. You admit it even, and it cannot be denied, that you sailed with an incompetent crew. If so, of what consequence are the desertions at *Wilmington*? If they were desertions of qualified persons, that would not create the deficiency; it would only increase it. If of unqualified persons, it would only prove that the original deficiency was still greater. You have tied yourself down to the necessity of showing that it was impossible (as you allege) to procure a proper crew in the port from which you originally sailed — and you were bound to do so, for a *British* navigator can surely never be admitted to justify, by showing that he could not procure *British* seamen in a foreign port, without showing that he sailed from his *British* port with his proper complement, or that it was impossible to procure them.

Is



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Is the fact then true or false, that you sailed from *Guadaloupe* with an insufficient crew? You have in truth, as observed, directly alledged it, by pleading that a sufficient crew *could by no possibility* be had. But how is that proposition itself supported? Why, merely by showing that *British* seamen, *i. e.* *British-born* seamen, could not be had at that place, at that time only; and three out of the four witnesses are brought to prove nothing else than a dearth of such persons at *Guadaloupe*. Take your fact, as alledged and proved, though it hardly required a proof, under the known circumstances of such a place at that period. But what follows? Does such a fact create such a necessity as the law would respect? Undoubtedly it would, if it were true, as has been assumed throughout, that *British-born* seamen were the only qualified persons; then, indeed, it would follow, as argued, that the trade of the place must immediately stand still, or you must submit to the necessity of engaging others. But is it the fact? Assuredly not; for besides negro seamen who are privileged, is it not a fact that every freeman, born or domiciled at *Guadaloupe*, was perfectly capacitated to serve, and would have been recognized in his *British* character in any penal prosecution of this kind? Is the law of *England* so niggardly in the communication of its privileges as to refuse to those, who by compacts founded on the success of its arms had become the subjects of its government, the character of *British* subjects? For purposes of this kind the whole island had become *British*, — it had a *British* custom house established, and *British* laws operating, as far as they could properly be applied. On what other ground is Mr. *Lawless* avowed

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the owner of a *British* registered ship, or Monsieur *Tommen* the charterer of the ship, paying *British* duties? The defence in this case ought to have been, that they had taken on board *Guadaloupe* mariners, now become *British* subjects, though not *British*-born, and that these persons were *Guadaloupe* men, either by birth or by residence, at the time of capitulation; and a moderate degree of evidence would have sufficed for the domicile of so loco-motive a being as a seafaring man usually is. Instead of this, here is a large outfit of men described as of *America*, or of foreign ports in *Europe*, without any thing to shew that they had the slightest connection with *Guadaloupe*, or had ever been there but upon a single voyage, which had recently brought them. A statute superadds the condition that *Guadaloupe* mariners should take the oath of allegiance. But if that statute had then either not passed, or had not reached *Guadaloupe*, this Court would confidently have held, that in such a case the mariners of that place had been sufficiently incorporated into the *British* population, without the performance of such a ceremony, by the capitulation and cession of the colony. If the statute had reached the island, care should have been taken to administer the oath of allegiance.

With this crew, however, the ship sails to *Wilmington*; where, says the supercargo, many mariners deserted. For the reasons given, it is not worth while to enquire what was the quality of those deserters; because, were they *British* or foreign, it makes no difference, either as to original shipment at *Guadaloupe*, or final result  
at

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at *Barbadoes*. He goes on to say, (his expression is observable,) *he doubts not to prove* many shipped at *Wilmington* as *British* subjects; of which, however, not one particle of proof is adduced, although he had in these terms expressly taken upon himself the burthen of proof. The only witness examined to transactions at *Wilmington* is *Peregrine*, the asserted master, who had no concern with this ship till after these men were shipped. The ship, which till the commencement of *April* had been under the command of *Nixon*, afterwards appears, on his discharge, to be under the command of *Guatier* and *Bernard*; and it was not until the 18th of *April* that this *Peregrine* ever saw this ship, and he appears on the muster roll as having actually entered on board not till the 18th of *May*—and all the new seamen had entered long before; so that all he knew of desertions and enlistments must be resolved into mere information. He says that *Gibson* and himself used every endeavour to bring back the seamen. What were their endeavours? what are the traces of them in any recorded application to the local magistrates, or in any protest noticing these transactions at the time?—there is not the slightest indication of any thing of the kind. Is any witness produced who was cotemporary with these renegadoes?—no such person—nobody but this *Peregrine*. Both he and *Gibson* urge, as a confirmation of their facts, that they offered 20 dollars per month (they represent this as an extravagant premium) for *British* seamen. The fact appears, as far as can be collected from the muster rolls, that 20 dollars was the ordinary pay for all mariners, whether *British* or not,

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They say they were detained till 30th *May* for want of seamen ; when the fact appears again upon the muster roll, that they were all on board long before — that they registered at *Wilmington* on the 15th *April* 1825.

It is impossible therefore to say, that if the original sin of an improper shipment of mariners at *Guadaloupe* could be purged by the ensuing transactions at *Wilmington*, that these transactions are in any degree established in a satisfactory manner. One witness only, and he having no personal knowledge, is produced, proving no endeavours in any particular mode, — in such modes as men ought to have resorted to on such occasions. Nothing appearing of record upon the papers, where they ought to have appeared — nothing to meet the eye of a fair enquirer, when the ship arrived at *Barbadoes*, to account for the deficiency of the crew. All must be taken upon the word of this witness, discredited as he appears to be, not only by his necessary ignorance of many of the facts, but by his misrepresentation of those with which he is acquainted.

Upon this branch of the case I am clearly of opinion, first, that such a necessity is not even shown in allegation, and that if it were, the evidence fails in supporting it ; but I am of opinion that the other branch of the case more completely develops the real nature of this transaction, — that which concerns the appointment of masters.

It appears by the *British* register at *Guadaloupe*, that this *Samuel Gibson*, who is the great mover in the whole course of the business, was master on the 21st of *November* 1815, and that *James Nixon* succeeded

succeeded him (ostensibly at least) on the 15th of *December*. Why this change was made *non constat*, for *Gibson* was to go with the ship throughout,—nothing was to be transacted without him; for never man had fuller powers, as well for the owner of the ship, as for the owner of the cargo; and why he was not as fit a master of a ship in *December*, as he had been in *November*, does not at all appear. Whatever was the cause, whether because he was a native of *America*, is not distinctly shown; but *Nixon*, who is described to be an *Englishman*, is invested with the command, and (strange to tell) at a time when *Gibson* expressly swears that it *was wholly and altogether impossible* (I use his own words) *to obtain a British master upon any terms, or any wages, at Guadaloupe*. This certainly leads, as already observed, to a suspicion that *Nixon* was not the master, but was on board in some other character, allowing for all the talent of conquering impossibilities which these parties affect to possess; for on no other ground can you reconcile the two positions, that *Nixon* was the real master of this ship (which *Gibson* swears him to be), and that it was wholly impossible to procure a *British* master. However, a paper found on board explains this mystery; for it proves, beyond all contradiction, that *Nixon* was not the master, that he was only the mate, though to colour the fraud still further, he is charged as having master's pay, 90 dollars per month, when the real master was *Daniel S. Cooke*. That this *Cooke* was an *American* I can have no doubt; an examination taken of a *Daniel S. Cooke*

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almost identifies him by the peculiarity of the name, *Daniel S. Cooke*, and the similarity of the handwriting leads to the same conclusion. The very circumstances, of his being in a disguised character on board, and of his being withdrawn afterwards in a manner totally unaccounted for, ripen the suspicion into absolute proof. It was not convenient for Mr. *Cooke* to go to *Barbadoes*, where he had already acknowledged himself an *American* upon a recent cause there determined; he therefore absconds at *Wilmington* without beat of drum, and somebody is to be found whose face is less familiar at *Barbadoes*. Now this gross fact establishes two conclusions that bear hard upon this cause—first, that *Gibson* has extinguished all claim to any credit for any thing he advances, deposing as he does that this ship sailed under the command of *Nixon*, and knowing at the same time that this was perfectly false, and that *Nixon* was not the master, but was merely to wear that character, in order to defraud the law. As the confidential agent of the owner of ship and cargo, and conductor of the whole machinery in this business, it is quite impossible that it should be a secret to him; he stands therefore convicted of a falsehood which vitiates his whole testimony, detected and demonstrated by the production of this paper. The second is, that this whole transaction is clearly proved to be *born in sin*, in an attempt, carried into execution, to elude and deceive the law, by fraud and fallacy. This is a taint which sticks to it in its birth, and travels along with it throughout its whole course. It gives it an indelible character;

character ; it colours every thing that follows. The same artificer of fraud continues to act, and you have a right to presume that he continues to act upon his own principles.

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There can be no doubt that this fraud *in limine* is a high offence against the letter and spirit of the navigation laws, the good policy of which is to encourage its navigation by confining it to *British* subjects, of which fact, so far as concerns the master, in all cases the register is the leading proof. A false register in that case is no register at all ; and it is worse than no register, if falsified for the direct purpose of substituting a foreign master for a *British*. How far this might affect in all cases the cargo as well as the ship is a question which it is not worth while to hunt through this whole body of statutes in order to solve,—in order to determine what is the rule the statutes would apply in a case where the shipper of the cargo was clearly ignorant and innocent of this breach of the statute. But that is not *this* case ; for in this case the agent for the ship is likewise the agent for the cargo, perfectly apprised of every thing that concerns both, and empowered to act for both as if they were personally present ; and the question would be very different, how far the acts of a person so commissioned, and so instructed, would not affect both his principals to the utmost extent. But to pursue the history :

*William Cook* retires silently, *non constat* when ; and *Dixon* is discharged from the office of master—a *nominal* office, if he left the ship before *Cook* ; and a *real* one, to which as master he had succeeded, if he left it afterwards. A new master is then to

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be looked out for ; and it appears that a Mr. *Guatier* was applied to, who continued for some time at *Wilmington* in the management of the ship, acting as commander in the room of *Nixon*. What countryman this *Guatier* was does not appear ; but on the 10th of May he declares that he cannot proceed to sea with her, and recommends Mr. *Barnard* for the station and services they had so kindly offered, i. e. master or commander. And true it is that this Mr. *Barnard* is found an adventurer on board this ship, dropped down into the character of mate, though described by *Guatier* as a man eminently qualified for master, and recommended for that station. But a Mr. *Peregrine*, an *Englishman*, had fortunately dropped down from the skies in the interim, and he takes possession as master on the 18th May. These transactions at *Wilmington* must receive their real interpretation from their predecessors at *Guadaloupe*. It is the same play performed by different actors : *Peregrine* is what is technically called the double of *Nixon*, and *Barnard* of *Dan. S. Cooke*. I think the Court has a right, on the fair and not uncharitable view of all circumstances, to infer that this is the real state of the facts.

I do not mean to say, that if such a case as this had come honestly and avowedly before the Court, that an *English* master had been put on board at *Guadaloupe* without any disguise, but had afterwards been discharged at *Wilmington*, on account of gross misconduct ; and it had been proved by credible testimony, and by authenticated documents, that an *English* master could not possibly be had, after all honest endeavours used for



that purpose, and that an *American* mate had been hired to navigate the ship down to the *English* port, with a clear intent of instantly disclosing the fact—I cannot say with what degree of indulgence a Court might have received such a case, if free from all suspicion of ill faith. Certainly I cannot go the length of saying that an *English* owner can under no circumstances whatever discharge a worthless fellow from the care of a valuable ship and cargo in a foreign port. The statutes have not provided for the case, but natural justice seems to do so, and a case of pure necessity, proved as a case of necessity, provides for itself. But here is a total want of good faith—here is disguise attempted, and imposition practised, throughout. The credit of the parties is destroyed—you can give no credence to their history in any part—the ground sinks in wherever you tread upon it—and even an honest case would be infected by such a mode of conducting it.

What the real interests in this ship and cargo are, the evidence does not satisfactorily disclose; for it does not, as I have observed, satisfactorily prove any thing affirmatively. There may be *American* interests or *French* interests concerned—all that is out of sight—but it is enough that the transaction is conducted otherwise than *British* law requires, and with a total want of that good faith which could entitle it to the indulgence of the Court, if it had the power of extending it.

I must, therefore, affirm the sentence of the Court below.

The *GENEROUS*.

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## JOHN, BECK.

Dec. 1st, 1818.

Captors having a bonâ fide possession, and using due care, are not responsible for losses occasioned by mere misfortune.

**T**HIS was the case of an *American* ship and cargo, which, in ignorance of the peace which had been concluded between *Great Britain* and the United States of *America*, was seized on the 5th of *March* 1815 by his Majesty's ship of war *Talbot*, Lieutenant *John Mawdesley* commander, in latitude  $31^{\circ} 18' N.$  and longitude  $76^{\circ} W.$ , whilst proceeding with dispatches for the island of *Jamaica*. The *John* was laden with a cargo of molasses, and bound from *Matanzas* to *Portsmouth* in *America*. As soon as the capture had been made, Lieut. *Mawdesley* put a prize master and part of his crew on board the *John*, with directions to keep company with the *Talbot*, and proceed to *Jamaica*; but in the course of the night between the 11th and 12th days of *March*, the vessel was unfortunately lost on the rocks between *Point Mulas* and *Moha Keys* in the island of *Cuba*.

A claim was given by *Thomas Wilson* on behalf of *Reuben Shapley* of *Portsmouth*, in the state of *New Hampshire*, as the sole owner of the ship at the time she was taken, and describing the place of capture to be in latitude  $31^{\circ} 40' N.$ , and longitude  $78^{\circ} 10' W.$ , and the capture to have been effected after the period limited by the treaty of peace for capture in that latitude and longitude had expired.

A monition

A monition was taken out against the captor to proceed to adjudication, to which an appearance was given under protest.

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Dec. 1st, 1816.

**JUDGMENT.**

*Sir W. Scott.* — This case began with a monition to proceed to adjudication. The party monished appears under protest to shew cause why he should not be compelled to proceed to adjudication. The grounds of the protest, and the answer, bring the merits sufficiently before the Court to enable it to decide the question, whether it should enforce the monition ; for if there should appear in the protest sufficient grounds to release the party from so proceeding, of course the monition would not be enforced. If no sufficient matter is shewn, the course must be different ; and the sufficiency depends upon this, whether the parties, upon their representations, have shewn such a state of facts as would entitle the mover to recover upon the result of further proceedings ; for if it would not, the Court would certainly be disinclined to compel the parties to incur an expence that would lead to nothing — and this more particularly by an inquiry into transactions of four years ago, when all the witnesses on one side are dispersed beyond all hope of recovery, when the person charged with wrong doing will find himself totally disabled to obtain the testimony that might be absolutely necessary for his defence, although he might have obtained quite sufficient for it, in the course of such an inquiry, if instituted in proper time. It is impossible to state a case in which the obligation of an immediate proceeding on the part of the complainant

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complainant could be more *visible*. He must know that the witnesses of the defendant must be the crew of his ship of war; that a peace having taken place, all that crew must have been discharged near four years ago, and that the defendant must search the world over to recover them if possible; but that the case must in all probability be maintained upon its facts, by witnesses all on one side, and those on the side of a penal prosecution, without any means of defence on the other. The defendant must blame himself, if a Court feels a great indisposition to consider a case so to be brought before it. The present question is, whether enough does or does not appear to exonerate the party from being placed in a situation of such extreme and unfair disadvantage. These considerations lead to a view of the representations of fact as contained in the protest, and the affidavits which support them.

The complainant in this reply appears to put his case on two grounds: First, the general right to restitution in the case of a capture made out of the due time and place. Second, on mismanagement of the ship while in the possession of the captors, by which the misfortune was occasioned. I shall consider this latter question first, because, if proved, the responsibility clearly attaches. It would do so upon a capture made *flagrante bello*. Whether the misfortune is to fall upon the *British* captor or the *American* owner, it is perfectly clear, that if the *British* captor is to be considered as a *bond fide* possessor, using due care in the possession, he is not answerable for mere misfortune. That misfortune must fall where it immediately lights; and I have no doubt, on a view of all the circumstances

circumstances represented to the Court, that due care under the possession was applied.

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The only remaining question therefore is, whether the original act of possession was a *bond fide* possession. A *bond fide* possession I understand to be, that which is honestly taken under all the knowledge of rights which the party had or could have had upon due and practicable inquiry. The very title of *bond fide* refers more to the integrity of the party than to the legality of the act, appearing afterwards by circumstances not within his reach at the time of the transaction: it is an attribute of the person, not of the act. He may err, but he errs *optimâ fide* if he acts honestly, according to all the information he either had or could have procured. Most certainly it is not sufficient for a party to plead ignorance as a legal excuse for making compensation to another for an act under which he had suffered, if his ignorance was vincible by himself, and ought not therefore to have existed at the time at which the transaction complained of took place. But if the ignorance was invincible by any endeavours to which he could have resorted, it certainly leaves him in full possession of his title of *bond fide* in the original act. And I take this to be a distinction between the common law cases cited by counsel and such a one as the present. The bailiff who executes a warrant is bound to look to its legality at the time of execution. It may perhaps involve a question of law of no easy solution to such a person; and it may afterwards exercise the sagacity of a whole Court to ascertain whether under all circumstances it was legal or not; but if so determined,

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determined, its effect is retro-active on the person who executed it. He cannot plead ignorance of the law in excuse of his act; every man is bound to know his own domestic law, wherever he applies it; and if he mistakes, he is answerable for the effects of his own misapprehension. But the present case is an ignorance, not of a law, but of a fact out of which the law is to arise — the ignorance of a foreign fact, not governed by his own domestic law, but dependent on transactions of state, with which he is wholly and unavoidably unacquainted till they are actually communicated. No practicable endeavours of his own could have removed that ignorance; it is therefore an ignorance honest and invincible on his part, and he has the full benefit of all the privilege which honest and invincible ignorance can confer. He is acting upon rights which he could have no reason to suppose were divested, and so acting, he is certainly acting with as much *bond fide* as if these rights were in the fullest actual existence.

The law therefore compels me to attribute to this person all the privileges of *bond fide* conduct in the original act; and if nothing follows but what naturally and usually follows such conduct, nothing is imputable. He puts it into the hands of his own agent: — assuredly so, and with the most perfect right so to do, not merely on the duty he owes his own sovereign, (for that would be no defence against the complaint of the subject of a foreign state,) but on the general law and practice of capture. He is the officer of the law taking a *bond fide* possession, and he is acting regularly in pursuance of that possession by means of his agents;

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agents ; and any mere misfortune which happens in such a custody is a misfortune to the owner, the custody not being tortious. I am therefore clearly of opinion, that this individual is not answerable in the way of compensation for the damage this misfortune has produced, though if no such misfortune had happened he must have relinquished the possession, and returned the property to the owner.

In determining thus, I certainly go no further than the expressions warrant, that this individual captor is not liable to this individual sufferer. That does not exclude a liability elsewhere, if it exists. Whether there be such a liability in the government is a question which I am not called upon to examine. I have neither the proper parties nor the proper evidence before me. It is sufficient to observe upon that matter, that there may possibly be such a liability. There doubtless would, if the government had not used due diligence in advertising the cessation of hostilities in the quarters, and at the periods stipulated, if that were practicable. If it appeared that no want of due activity could be imputed, but that the conveyance of intelligence was not physically practicable within those quarters, then this question might result, whether the two governments had mutually bound themselves to answer to each other for mere casualties occurring under a possession justly taken. The terms of the contract do not go so far as to outrage that case. They continue the right of capture absolutely to the full effect of vesting the interest in the captors by prorogations founded on a reference to the possibilities of conveying information

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mation to various distances upon the globe where such captures might take place beyond. Within such times captures are valid, to the effect of justifying the seizure, if made ; with the information, that they impose the duty of restitution. Whether, if the property is lost by mere chance, without any fault on the part of the governor or the captain, an obligation is incurred to restore in value what has been taken away by mere misfortune, the terms of the contract have not specifically provided for ; and just principle seems to point another way. That, however, is not the question now before me for my decision. All that I have to decide upon is, the liability of the captor in this particular case ; and I am clearly of opinion that he ought to be exonerated.



## LA BELLONE, DUPERRE.

**T**HIS was the case of one of the *French* ships of war which was lying in the harbour of *Port Louis* in the *Isle of France*, when that island was blockaded by his Majesty's land and sea forces, under the command of Vice Admiral *Bertie* and Lieutenant General the Honourable *Ralph Abercrombie*, and was surrendered and delivered up, on the 3d of *December* 1810, together with the town and fortress of *Port Louis*, and the other public property belonging to the *French* government, by virtue of a capitulation, under which the *French* officers and crew were permitted to proceed to *France*.

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Head-money  
not due on ships  
captured by  
conjunct forces  
of army and  
navy in har-  
bours, rivers,  
&c.

On the 12th of *December* 1811 the ship and cargo were condemned to his Majesty, as taken by his Majesty's sea and land forces.

On the 6th of *May* 1817 an attestation and certificate having been brought in, the Judge pronounced that there were alive and on board this ship at the commencement of the action 327 men, but reserved the question whether *head-money* was due to the captors.

On the 21st of *January* 1818 the King's Proctor alleged that he had received directions from the Lords Commissioners of the Treasury to consent to the claim of the captors for *head-money* being brought

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brought for decision before the Right Honourable the Judge of this Court.

An appearance was also given for Vice Admiral Sir *Albemarle Bertie* Baronet, the surviving trustee appointed by his Majesty for the distribution, to the captors, of the public property captured at the *Isle of France*, and the commander-in-chief of the naval forces employed in the capture of that island.

For the captors it was contended that *head-money* was due under 45 Geo. 3. c. 72. s. 5.; that the statute gave a direct title to *head-money* to the naval captors, and that it could not be diverted by the co-operation of the land forces; that the navy did not claim any exclusive right in the present instance, but were willing to share with the army; that the principle on which *head-money* is given is to encourage attacks upon the enemy's ships of war; that the danger to be incurred in such attacks is frequently as great in conjoint expeditions as in those of a purely naval character; that it had been the practice of the Commissioners of the Navy to pay *head-money* in cases of ships of war taken in conjoint expeditions; and that they had actually paid it on certain of the enemy's ships taken at the *Isle of France*.

On the other side it was contended that the statute did not apply to ships taken by conjoint expeditions of the army and navy; that in the cases referred to the payment of *head-money* had been made inadvertently, and without consideration of the distinction between conjoint expeditions and others; that the general practice had been

been otherwise ; and that the point had been decided upon by the Lords Commissioners of Appeal in the case of the *Hoogskarpel* (1785). LA BELLONE.  
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## JUDGMENT.

Sir *W. Scott*.—This is a question of the right of *head-money* claimed by the captors of the vessel in question ; and I consider it as not put by the one side or the other on any particular circumstances distinguishing the present from similar cases, but upon the general title of the army and navy to *head-money* on ships captured, not at sea and by ships alone, but in harbours and rivers, and other such places, as are the objects of joint attack, in conjunct expeditions conducted by both species of force, acting on the common service in the way that their instructions, or the discretion of their commanders, may concur in deeming most effective for the common purpose.

All specialties, therefore, are entirely out of the case. It is a sufficient statement of the facts necessary to found the question, that these ships, for the capture of which *head-money* is claimed, were taken at the surrender of the *Isle of France* to a conjunct force, acting under the command of Vice-Admiral *Bertie* and Lieut. General *Abercrombie* ; and that the claim is given on behalf of these officers, and of the persons under their command. The number of men to which *head-money* is proportioned on board the captured ships has been ascertained by the Court, not certainly by way of helping out the claim in any manner, but merely

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for the purpose of removing the difficulties that might otherwise be in the way of applying the decision to the facts, if the decision should prove favourable to the claim.

The question is referred to this Court for decision by the Board of Treasury, and expressly for a *legal* decision; thereby meaning certainly to intimate that nothing that could be so deemed had, to their knowledge, taken place, and therefore clearly that no opinions or acts of their own were so to be considered.

The statute enacts, that in cases in which doubts shall arise whether the parties claiming *head-money* are entitled thereto, the same shall be summarily determined in the course now taken; the legislature probably thinking that the history of this particular subject being more familiar to this Court, a question of this kind might probably receive a readier illustration from its knowledge of the history of the law, than might possibly be within the immediate view of those judicatures which are the more regular and constitutional interpreters of statutes.

The decision which is required is a *legal decision*; and if a decision so to be qualified had been given before, it would be the duty of this Court, in the consideration of the present question, to weigh that decision, and to allow it all the authority which is justly due to all former legal considerations of the same matter. But no such decision has been offered to the view of the Court. All that is alleged is a practice that has obtained in some instances, by the will of persons who,  
whatever

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whatever be the respect due to their stations and characters, are in law incapable of giving a legal decision. It appears that on applications for *head-money* in some cases of conjunct expeditions, to the Commissioners of the Navy, they have not submitted immediately to the claim, as they would have done, in pursuance of the act of parliament, upon a clear judgment of its validity; but have invoked the judgment, or at least the authority of the Treasury, to sanction any payment; and the Treasury has, in some instances, exercised either its judgment or its authority in sanctioning such payments. The number of instances in which this has been done is not exactly ascertained. The Commissioners in their return made to the Treasury mention but two: the industry of the claimants has furnished several more; and two or three of them are in the cases of some other ships taken upon the very same occasion with those for which the present claim is instituted. I should have thought, that the whole number for which the *head-money* had been so given bore a very small proportion indeed to the number of those which had occurred in the numerous expeditions of this kind that took place in the course of the late protracted wars, and for which no such claim had been made, or if made had not been assented to. The contrary, however, is asserted; and I have not the means of either contradicting or confirming that assertion. Take it any way, it is impossible to ascribe to such a limited practice as this, the reverence due to a course of legal decisions.

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The first board to which application is made, plainly hesitated in opinion. It referred the matter to another authority; and that authority, acting on its *financial* powers, rather than on any thing that can be deemed *judicial*, and in a just confidence that parliament would ratify and confirm such exercises of discretion in such cases, directed the payments to be made in those instances. To such exercises of discretion, if they were much more numerous even than they are, no judicial character can be applied. The utmost effect that could be attributed to them, in a legal discussion, would be to incline the judgment, in a case of *extreme doubt*, in favour of the existing practice, countenanced as it was by opinions, though not judicial, yet respectable in themselves, and resting upon considerations of apparent equity. But to admit them to that operation, it must appear that the question is one of *extreme doubt*, and that the Court is not shut up from entertaining any such remote grounds of interpretation by the intelligible language of positive law. For the whole of this subject is the creature of mere positive law. *Head-money* is not property acquired in any manner by the captors, or to be demanded on the ground of any antecedent title. It is a mere voluntary grant of public money: and the grantees must be content to take what is actually given and no more. The Court cannot amplify the grant by constructive analogy, and by so doing take upon itself the double impropriety of imputing blame to the legislature for a supposed omission, and arrogating to itself the further disposal of public money. By every rule of interpretation

tation that can apply to such a matter, the Court is bound to confine its exposition within the very letter of the statute, if that letter speaks an intelligible language.

LA BAYLONNE.

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Now it has been admitted that in the present instance the case does not come within the specific terms of the grant. The grant is *to naval persons acting in a capacity merely naval in the capture of ships, and effected by persons acting on board the ships that make the capture*. Soldiers are not recognised as grantees in any other manner than when they are clothed with a *naval character by serving on board ships*. The grant in the whole of its extent relates to *naval capture only*. Where it is not *purely naval*, the statute has thought fit to be silent; and it is not for this Court to introduce a different description of service into a grant where it is not.

The whole history of this matter confirms the limitation. Till late times the distribution of prize property was wholly within the authority of the Crown; and till *very* lately, in regard to conjunct expeditions, the course was for the Crown to give instructions for the distribution of all property taken on conjunct expeditions. All prize acts, until the last, have been *purely naval*. The parties entitled under them have been entitled *by naval description only*. They recite the royal grant, on which the whole right is originally founded, as confined to *naval captors*. The subject matter is within the *maritime* jurisdiction alone. The *army* is not recognised in any one of these acts until the very last, (that of the 55th

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of the King,) as having any title to prize, much less to head-money. Head-money is a bounty which was first introduced into what is called the Cruiser's Act, (passed in the 6th of Queen Anne,) and then rested on grounds of *naval policy only*. It had reference to *naval capture*, and goes no further in its terms than to reward services of that description.

It long remained a subject of some uneasiness between the two services, what was the claim of a military force acting with the navy on conjunct expeditions. Certainly no such claim even to prize could be maintained on the statutes, (for, as I have said, they pointed only to naval captors,) and much less to head-money, which, if granted at all, could be applied only to the naval service, in the very terms in which it was expressed. At length came the case of the *Hoogskarpel*, which was one of several *Dutch* ships taken in *Saldanha Bay*, near the *Cape of Good Hope*, in 1781, by a conjoint force under Commodore *Johnstone* and General *Meadows*, acting according to instructions under the king's sign manual, which directed that all the *booty* taken should be divided *between the land and sea forces*. The question of interest in these captures, made at sea, was first agitated in this Court, where the Judge, according to the expressions used in his sentence, pronounced for the interest of the army, "agreeably to the *spirit* of his Majesty's instructions." On appeal to the Lords, the case was argued with great ability for several successive days, and an elaborate judgment was pronounced on the 30th of *June* 1786,  
by



by Earl Camden, then President of the Council, assisted, as I best recollect, by Lords Kenyon and Grantley. They laid it down, that *conjunct expeditions* were entirely out of the statute with respect to *both* the services; and that the whole property captured was at the disposition of the Crown, whose equity and liberality in justly estimating the merits of both could not be doubted. The same arguments were urged then as have, with great propriety, and with great ability, been urged now — such as that the co-operation of the army could not divest the title of the navy; that *their* interests were still preserved; for that they were *takers* in a sufficient degree to answer the descriptive terms employed in the statute. But these arguments were urged in vain; the property was condemned to the Crown, *and no head-money allowed.*

This being the settlement of the law, at that time, by the highest authority, it is clear that no interest can now be communicated to either service on conjunct expeditions, except such as arises from new matter in later statutes. So far as that new matter goes, so far an interest is communicated, and no further. Now a limited interest, under strict regulations therein prescribed, has been conveyed by the last statute (the 55th of the King) to both services; but it is an interest in *prize* only; the subject of bounty or *head-money* remains exactly as it did upon the more ancient statutes, without any amplification or enlargement whatever. If the law did not then convey an interest in *head-money* to either service, it cannot

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do so now ; it cannot now apply *to a conjunct expedition*, if it did not at that time.

On these grounds I feel myself bound to a strict interpretation of the statute ; the statute does not apply to *conjunct expeditions*, and, therefore, I am clearly of opinion, that the parties in the present case are *not* entitled to head-money.

## HERCULES, CHITTY.

THIS was the case of a vessel sailing under the colours of the independent government of *Buenos Ayres*, with *Portuguese* and *Spanish* colours also on board, but owned, according to the bill of sale found on board, by *British* subjects. It appeared that she had formed part of an armament, equipped and commissioned by the government of the *revolted provinces of South America*, for the purpose of intercepting the trade of the subjects and adherents of the King of *Spain*; that she had made various captures in the *Pacific Ocean*, and ~~had~~ plundered, ransomed, and sold *ad libitum*, and without adjudication, the cargoes of numerous vessels seized by her; and ~~had retired from her~~ ~~cruise~~ with a full cargo of merchandize. She afterwards proceeded to *Barbadoes*, with her cargo on board; and, in the month of *September* 1816, came to an anchor within the port of *Bridge Town* in that island, under an allegation of distress. An application was made to the governor to allow the vessel to refit at *Bridge Town*, which was refused, but the ship's papers were returned, after an examination of them by the Attorney General for the island; and the ship immediately got under weigh, for the purpose of taking her departure, when Captain *Stirling* of his Majesty's sloop *Brazen*, which was then lying in the harbour with the mails on board, and under sailing orders for *Antigua*, seized her for a breach of the navigation laws; but upon a reference to the instructions he had received from his admiral, respecting vessels of

Jan. 21st, 1819.

Jurisdiction of Vice-Admiralty Courts in revenue cases is of mere statutory institution; and by stat. 49 G. 3. questions of this sort must be tried either where the offence was committed or the seizure made.

The Hercules.

Jan. 21st, 1819.

of this description, he became afraid to prosecute, and accordingly returned the ship's papers. Thinking, however, that he had acted precipitately, in releasing a vessel of so mysterious a character, and fearing that he might be censured by his admiral for so doing, he told *William Brown*, who was on board, and asserted himself to be the owner, that "*it might not be amiss*" for him to accompany him to *Antigua*, where *Admiral Harvey* then was; alleging, by way of inducement, the probability of obtaining from him the indulgence which had been denied at *Barbadoes*. The two ships then weighed anchor, and proceeded on their voyage; the *Hercules* having greatly the superiority in sailing, and being several times obliged to shorten sail to allow the *Brazen* to keep up with her. On the 28th of *September* they approached the island of *Martinique*, when Captain *Stirling*, suspecting the intention of those on board the *Hercules* to part company, sent an armed force on board, and took her to the admiral, who was then in *English* harbour. *Admiral Harvey* approved of the detention of the vessel; and Captain *Stirling* having consulted the law officers at *Antigua*, was by them advised to institute proceedings against her in the Instance Court of Vice Admiralty, for a breach of the revenue laws by an illegal importation into *Barbadoes*.

An information was filed on the part of the seizer, and a protest against the jurisdiction of the Court on the part of Mr. *Brown*. This protest was overruled by the judge, and he was assigned to appear absolutely.

A claim was then given by Mr. *Brown* for the ship and 119 doubloons, as his own property: for the

the guns, arms, and ammunition, on behalf of the independent government of *Buenos Ayres*: for the cargo, gold dust and specie, on behalf of himself, his officers, and crew, and the independent government; and for 28 doubloons and 26 pieces of gold, on behalf of *Walter Dawes Chitty* the master.

*The Hercules*

Jan. 21st, 1819.

On the 13th of *November* 1816 the cause was heard, when the Judge of the Vice-Admiralty Court at *Antigua* pronounced for the jurisdiction of that Court, rejected the claim for the ship, guns, specie, &c., and pronounced the same to be forfeited for a breach of some or one of the laws relating to trade and navigation.

From this sentence an appeal was prosecuted to the High Court of Admiralty, in which Court the following claims were given:

A claim of *John Garcia* of *London*, merchant, stating himself to be duly authorized by his most catholic majesty the King of *Spain* for the cargo and specie, on behalf of the King of *Spain* and certain of his subjects.

A claim of *P. C. Timmerman*, on behalf of *Jose Antonio Llorento* and *Joaquim de Llostra* and others, of *Cadiz*, merchants, and subjects of the King of *Spain*, for such parts of the cargo as had formed part of the cargo and stores of the *Spanish* ship *Consequencia*.

A claim of *William Dawes Chitty*, the master, for the ship, cargo, and specie, as having been unduly seized and taken from his possession, no offence having been committed against the laws relating to trade and navigation.

Inhibitions were decreed upon these several claims being made, and also upon the appeal of  
*William*

The *HERCULES*.

Jan. 21st, 1819.

*William Brown* as claimant of the ship, cargo, and specie, as before stated.

The usual proceedings were had, and the cause came on for hearing, when it was agreed that the question of jurisdiction of the Court below with reference to the interpretation of the statute 49 G. III. c. 107., should be disposed of in the first instance.

#### JUDGMENT.

Sir *W. Scott*. — The question in this case is, whether the jurisdiction was legally founded in the Court below, for the species of cause which alone was instituted there — *a cause of breach of revenue*. For on no other ground has this ship been proceeded against. On that ground alone condemnation passed, and on that ground only is this cause devolved by appeal into this Court, which is not admitted to have any original jurisdiction upon it. If *that* Court had no jurisdiction, the whole that passed there was *coram non judice*, and therefore without any legal validity; all the evidence would be taken without authority, every act done in pursuance be a nullity, and the appeal would convey to this Court no other authority than that of declaring that nullity, and of abjuring all further jurisdiction of its own upon the subject. If no *original* jurisdiction there, upon the merits of such a question, there can be no *appellate* jurisdiction here, except for the mere purpose of pronouncing every thing done in the prosecution of that unfounded *sui*. to be totally null and void.

The jurisdiction of the Vice Admiralty Courts in revenue causes is of mere statutory institution; — given to them by positive statutes; being no part

of their original and inherent authority, it exists only so far as it is so given. Nothing can be clearer than the understanding of the law arising upon the statutes, that till a late act passed, 49th Geo. III. c. 107., a prosecution for breach of revenue laws could only be maintained in that plantation within whose jurisdiction the offence was committed. It was so determined by a solemn judgment in the Court of Delegates, to which this Court is bound to adhere. It appeared to be a power very capable of abuse and oppression, to give the prosecutor a power of carrying a vessel to a distant port, where neither the fact took place, nor could the evidence be ordinarily found. The necessity of protecting the revenue has been thought, in later times, to justify an enlarged enactment in the statute referred to, that he might institute proceedings either in the settlement where the breach was alleged to be committed, or where the seizure was actually made; and to this alternative the power of prosecution stands, at present, enlarged and limited. The question may be tried in the one or in the other, at the option of the prosecutor; but it cannot be tried where neither the breach is alleged to be committed, nor the seizure actually made. In this case, the breach, if any, was committed at *Barbadoes*, but the matter was tried at *Antigua*, where it could be tried only on the ground that it was there seized. If not, *cadit quæstio*; and therefore the whole of the inquiry on the legal question of jurisdiction resolves itself into this simple question of fact: Was the seizure actually made at *Antigua*, or within its jurisdiction of neighbouring waters?

To determine upon this matter of fact, I must enter  
briefly

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briefly into the evidence ; but I shall enter into it so far only as may be requisite to illustrate that fact : for any other purpose it is at present inapplicable. Great part of this *rudis indigestaque moles* has been read, but only provisionally, to furnish me with such a view of the whole case, as might enable me to direct the course of proceedings in a matter where there were many parties, and the proceedings numerous and complex. But the jurisdiction being itself questionable, I shall use the evidence no further than may be necessary to settle that great and fundamental preliminary.

This ship, under the command of a Capt. *Brown*, who declares himself the *English* owner, came into the harbour of *Barbadoes*, when *Brown* entreated permission to repair his ship and to furnish himself with necessaries, after a long voyage from *Buenos Ayres* to the *Pacific Ocean* and back, with a cargo, composed, as it should appear, of goods taken as prize of war under a commission of war on board, granted by what stiles itself the independent government of *Buenos Ayres*. The governor of *Barbadoes* thought it his duty to refuse the permission requested, but returned the ship's papers, after an examination of them by the law officers of the Crown ; no charge of illegal trading in that island being alleged, or even thought of, so as to justify a seizure and prosecution on such ground. The ship was preparing to depart, when she was again seized by Captain *Stirling* of his Majesty's ship *Braxen*, lying there, and her papers were again examined. It is perfectly true, that to those who examined them (Captain *Stirling* and others,) this vessel must have appeared in a very mysterious and undefined character, with a commission of war from



from an authority not acknowledged; exercising acts of war under it; seizing the property of *Spain*, a country in strict alliance and friendship with *Great Britain*; and there are, perhaps, some traces, not wholly obscure, of the seizure of *British* property—all the property so acquired, composing a considerable cargo, asserted to belong in part to the unacknowledged authority which had granted the commission. That such appearances, which might have puzzled the acutest lawyer in the place, should very much embarrass Captain *Stirling*, is not extraordinary; especially as he was acting under strict orders for the protection of *British* property against depredations of this nature. In a case which the circumstances of the times rendered so perplexing and critical, he took the resolution, which was the very reverse of any thing like rashness, to go along with this ship down to *Antigua*, a neighbouring island, where his Admiral (*Harvey*) was stationed, in order to inquire from him what was fit to be done. As to the matter of any illegal importation committed at *Barbadoes*, it appears not much to have presented itself to his imagination. He knew that she had been examined by the law officers of the Crown, and that her conduct, during the time she staid there, had been the subject of vigilant observation. But these other mysterious circumstances alone threw a cloud around her, about which it was proper to be advised by that authority.

Now, upon this state of things, no man, I think, can say that Captain *Stirling* acted at all improperly or unadvisedly. Here was a case in all its circumstances extremely embarrassing, so embarrassing that I am not aware of any instructions, relative

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relative to these things, which shew that Government itself has quite escaped from the embarrassment into which the wars and confusions of that quarter have thrown it. Orders have been issued to observe what is termed a neutrality, between the Crown of Spain and communities, which, till they are acknowledged by other Governments, are, upon all ordinary principles of law, in peril of being considered as mere insurgents by the tribunals of those Governments which have not acknowledged them. No man can take upon himself to say that it belongs to those tribunals to determine the question of independence, upon which their own governments find it necessary to be silent. There may be, and is a time, at which insurrection itself is legitimated ; but it is not for foreign *Courts of justice*, but for foreign *Governments* to determine when that time is arrived ; at least so far as their own tribunals are to act upon transactions respecting them. The tribunals themselves have neither competency of knowledge, nor authority for such a purpose. Here are instructions forbidding the officers to suffer any depredations on *British* property to be committed. In the present case depredations may have been committed, in places where no *British* interference could have prevented it at the moment. I do not observe that any instructions whatever are issued for such a case ; but if officers have acted for the best in unprovided cases of this kind, they ought not to be sufferers.

Under the perplexity which this state of things involved, Captain *Stirling* had to determine the mode in which he should take the ship with him to *Antigua*, there to consult his Admiral respecting

respecting her; and the way which he took was by what his Counsel call a *ruse de guerre* — to return the papers, and invite her to go along with him by the prospect of obtaining at *Antigua* the supplies that had been refused at *Barbadoes*. Captain *Brown* apparently accepts the invitation, as it lay in his way to *St. Bartholomew's*, whither he was intending to go. They therefore set off in company together, Captain *Stirling* keeping the *Hercules* constantly in view, and expecting her to shorten sail; on the very next day he again took bodily possession, took out her men and papers, and carried her into *Antigua*, and waited upon the Admiral to receive his directions. The advice of law is called in, and the result is, a prosecution on a charge of illegal importation into *Barbadoes*, that had not been thought of by the crown officers at *Barbadoes* itself, where all the facts passed, and had been subjected to a double examination. This could never be the question about which Captain *Stirling* wanted to consult his Admiral; because I venture confidently to say, that on such a question as that, the crown lawyer at *Barbadoes* was a much better adviser. If, indeed, the intention was to resort to the Admiral for advice, under the mysterious circumstances which raised delicate political questions, it was highly probable that the Admiral, acting upon his instructions from his own Government, could have furnished the safest advice; but upon a mere dry question of revenue seizure, the opinion of the crown lawyer at *Barbadoes* would have been preferable to the judgment of a whole fleet.

At *Antigua*, it is determined to dismiss entirely all these mysterious circumstances, and to prosecute

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in that Island for illegal importation into *Barbadoes*. Whether there was any foundation at all for such a charge to be made any where, it is not proper for me at all to inquire, until the question of *jurisdiction* is settled. The jurisdiction resorted to is that of *Antigua*, within which it is contended that a second seizure was made : and if that be true in fact, the jurisdiction is clear ; but if the real fact be that there was only one seizure, and *that* at *Barbadoes*, and continued without interruption to *Antigua*, then the advice to commence proceedings there was unfortunately given ; it could lead to nothing but expense and disappointment. The whole matter comes to this short question — Was there any real release after the seizure at *Barbadoes* ? — for if there was not, then there was only one seizure, and *that* a seizure which could by no possibility found a jurisdiction at *Antigua*.

To determine this question it is proper to observe, that if after the return of the papers the ship still continued in the forcible possession of Captain *Stirling*, and was so determined by him to continue till her arrival at *Antigua*, the release was merely formal and apparent, and nothing more. It was a mere *ruse de guerre*. To continue the forcible possession of the ship, it is not at all necessary to continue the possession of the papers. Nor was it at all necessary that Captain *Stirling* should have men actually on board ; because if without that she remained still under his coercion, and was not at liberty to leave him, she was still in his possession. Was she at liberty, under this apparent release, to go where Captain *Brown* thought fit ? If not — *liber non est, qui non potest ire quo vult*. What is the release, in such a state of things, but a mere pretence

pretence and fiction, and nothing more? If the ship remained under the coercion of his guns, she was as much in his possession as if the men who were otherwise to work those guns had been put aboard that ship. Many captures have been held effectual, where no man has ever been put on board, but the ship only compelled to steer in the direction prescribed by her captor. Nothing can be clearer, from the whole nature and every circumstance of the transaction, than that she was never set at liberty. Captain *Stirling* was then determined to take the advice of his Admiral, and that she should not quit him till that advice was obtained. The matter was clearly so understood by him. How was it understood by *Brown*? He shortened sail, in obedience to the directions he received, thereby evincing his understanding of the condition in which he was placed. If he had ever thought otherwise he was soon undeceived; for the next day, on the very first suspicion of her intending to part company, she is brought to, and stript of her men. What sort of a release has been this? What can demonstrate more fully that the compulsion of the seizure remained throughout, exercised in a different form, but still subsisting in fact without any intermission; not a prisoner on parole, but a prisoner in actual custody — the door of escape shut upon her. What is to be inferred from Captain *Stirling*'s own account of this matter? It is observable, that in the affidavit which leads the proceedings, he no where describes when the seizure was made, but only states that he made a seizure. The second affidavit (that of the 3d of *October*) is more particular, and states a seizure

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in *Carlisle* bay, in the Island of *Barbadoes*. The account contained in this and his subsequent affidavit fully decides the nature of the seizure; it proves that his hand was never taken off, and that the formality of returning the papers was no real release. He says he felt it his *duty* to bring the ship to *Antigua*. It was not, therefore, a mere inclination on his part, but he was acting under a sense of duty. He says that he did not feel himself at liberty to institute proceedings without consulting his Admiral; and that he therefore persuaded Captain *Brown* to accompany him. What sort of persuasion this was may be easily imagined. It was like the persuasion of a peace officer conducting a person to a police magistrate without the actual enforcement of personal violence. However, even this forbearance did not last long, for on the day after leaving *Barbadoes* he admits that he took forcible possession of the ship, and conducted her to *Antigua*.

Two things then are to be considered; where the seizure *ought to have been*, and where it *actually was*. That it ought to have been at *Antigua*, in order to found the jurisdiction there, is admitted; but was it at *Antigua*? Now, to establish this point, the seizor's counsel argue, that the seizure by Capt. *Stirling*, at *Barbadoes*, was made *alto intuitu*, and had no reference at all to a breach of the revenue laws; that consequently it could not bar another person from making a revenue seizure at *Antigua*; and that if the property might be seized by any other person, it might by Captain *Stirling* himself, who states that he did make a formal seizure at *Antigua*. But was the seizure at *Barbadoes*

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*barbadoes alio intuitu*? It is difficult to reconcile such a supposition with Captain *Stirling*'s own statements in his different affidavits. In fact, the seizure seems to have been one which would have served for every purpose—for revenue purposes as well as others. It was a seizure for any question which he might think fit to raise. As to a subsequent seizure by another person, no other person could have seized, to any legal effect, while the property was under seizure by Captain *Stirling*. To be sure, if Captain *Stirling* had released, another might have seized; but then the second would have been an original and independent seizure. But what sort of a seizure is this, which is not original and independent, but engrafted on a subsisting seizure? Captain *Stirling* could not take a fresh possession of that which was already in his custody for every purpose to which he chose to apply it. Nobody can pretend that the seizure would not have served him for revenue purposes as well as others. Then what sort of an interpretation of the statute is this? Seize a ship at *Barbadoes*, and you may carry her where you please, and make a second seizure in any port, however distant. This reduces the act of Parliament, founding the jurisdiction on the place of seizure, to a dead letter, an absolute nullity. A man has only to say, I seized at first *alio intuitu*; but I do not proceed upon that act; I *here* seize for a breach of revenue laws committed *there*; and I will proceed *here*. Surely this would be to trip up the heels of the act of Parliament!

The seizure at *Barbadoes* then was not *alio intuitu*: and after all that I have said, how can I

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possibly consider that that seizure was released by the mere return of the papers? I see nothing wrong in Captain *Stirling*'s motives or his conduct: his motives were very proper, and his conduct not objectionable; but upon the *res gesta* I appeal to every man's feeling, whether the original seizure was not continued throughout. Whether there was any ground for prosecution upon an unlawful importation into *Barbadoes*, I do not presume to inquire; for, as the case stands, I am not at liberty to pursue that examination; but if there was such ground, the advice which ought to have been given to Captain *Stirling* at *Antigua* should have been to take the *Hercules* back to *Barbadoes*, where both the offence was committed and the seizure really made, and where alone that fact could be tried. If I am right, to try it at *Antigua* was only to lay in for unpardonable expense and final disappointment. If indeed any question, arising out of the mysterious circumstances before noticed, had been to be tried, *Antigua* was as good a jurisdiction as *Barbadoes*; but when all these questions were thrown overboard, and nothing was to be discussed but the revenue question, it could (according to the act of Parliament) be tried only where the offence was committed, or the seizure made. Being clearly of opinion that neither of these events took place at *Antigua*, I am bound to pronounce that the proceedings there had no legal foundation whatever, and consequently are null and void.

I observe that when this objection to the jurisdiction is offered, certainly (as has been remarked) somewhat incorrectly, because it appears to assert  
that



that no jurisdiction can exist anywhere but in the plantation where the offence is committed, whereas by the late statute it might also be where the seizure is made; this objection is met by an answer which seems totally unintelligible and inapplicable. The answer is, that the person who makes the objection asserts himself to be the owner, when in truth it appears, by a bill of sale found on board, that he had transferred the property. Supposing this to be the fact, and without any explanation, how could that enable any Court to pronounce for its own jurisdiction upon a question that depended on grounds which have no connection whatever with the personal considerations of the parties? Suppose a testamentary cause were brought in this Court, and the party contesting the will was an improper party, would that give this Court a jurisdiction to pronounce for the validity of the will? The Court is bound to reject what does not belong to its jurisdiction. The matter of ownership, however, in the present case, is fully and satisfactorily explained. The party had resolved to sell his ship, intending himself at that time to come to *Europe*. He changed his intention of coming, and though it would have been more regular to have cancelled the bill of sale, the transaction never took effect. The document remained in Captain *Brown*'s undisputed possession, as did the ship herself; and the party principal, to whom the apparent bill of sale conveyed her, never contested the interest of the claimant, though present at all these proceedings. It betrays an appetite for

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~~The *Herman*~~ jurisdiction to determine such a point on such circumstances.

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Upon the whole I am clearly of opinion that the jurisdiction at *Antigua* is unfounded. If so, the jurisdiction of this Court is also at an end in this appellate cause. What other grounds of proceeding may exist against this ship I legally know nothing, for all this evidence is taken without any authority, and is therefore entitled to no legal attention. I therefore dismiss the cause, and decree restitution of the property to the claimant.

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Immediately after this sentence had been pronounced, an application was made, on behalf of *William Brown*, to receive the proceeds out of the registry of the Court, to which they had been transmitted during the dependence of the suit; when it appeared that a caveat had been entered against their being paid out without notice. On the 16th of *February* the Judge was moved to decree the proceeds of the ship and cargo to be paid out of the registry to *William Brown*, or his lawful attorney. An appearance was then given for *Jose de Nicholas* and *Edward Dolman*, the lawful attornies of *Garcia*, who had been authorised to claim for the King of *Spain*. Attestations made by them were brought in, and a motion on their behalf made for a warrant of arrest of the proceeds of the cargo, *in a cause of piracy, civil and maritime*. A similar motion was afterwards made on behalf of *P. C. Timmerman*, for a warrant to arrest the sum of 30,000*l.*, part of the sum in the registry, alleged to be the proceeds arising from

from the sale of part of the cargo of the *Spanish* ship *Consequencia*, unlawfully and piratically seized on the high seas by *Walter Dawes Chitty* and *William Brown*, respectively *British* subjects, and others, and by them conveyed on board the *Hercules*, in a cause of spoliation, civil and maritime.

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## JUDGMENT.

Sir *W. Scott*. — The proceeding commences with an application on the part of the *Spanish* ambassador claiming, on behalf of *Spanish* subjects, certain monies remaining in the possession of this Court, alleged to be the proceeds of goods piratically taken from them on the high seas, and of which he prays restitution. Since that claim was made, another has been given by the subjects themselves, praying likewise to the same effect, upon the same grounds. This intervention makes it less necessary to consider the objections taken to the original application; for it is sufficient to substantiate the proceeding, (if otherwise good,) even supposing no different authority had been shewn to have proceeded from the Crown or its ambassador, or that there existed other formal objections to its validity. It is certainly no objection, in the present stage, that these monies are not shewn to be the proceeds of *Spanish* goods so taken. That is what the parties pray leave to shew, and undertake to shew, provided the Court has jurisdiction to entertain the inquiry. The present question is only whether the Court has such a jurisdiction, upon such an application so urged on the part of these parties, the sovereign and subjects of a friendly state invoking the justice of this country relative to property,

The Court of Admiralty has authority to entertain a civil suit for the restitution of goods piratically taken on the high seas.

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property, alleged to be theirs, remaining in the power of this Court, which, if it possesses such jurisdiction, possesses in it the means of rendering them justice upon the proof of their allegations. Its present possession of this money cannot be deemed otherwise than legal ; it came here in the regular course of legal transmission, directed by the Court itself, in an appeal depending in a revenue cause from the Vice Admiralty Court of *Antigua*, in the merits of which appeal the present could not be considered as interested parties. This Court reversed the condemnation and judgment of that Court, and decreed restitution to the parties out of whose possession the money was taken. Before the execution of that decree, the present parties intervene, alleging that the persons out of whose possession it was so taken had acquired that possession unlawfully and piratically, and therefore were not entitled to restitution ; that the property belonged to them, these interveners, and ought to be restored to them. The proceedings now assume a new shape and character, that which the records of this Court designate by the title of a *causa spoli civilis et maritima* ; and the question is, whether the Court has authority to entertain such a cause. The question must be understood to refer to piracy in its simple and ordinary sense ; for the specific facts which constitute the ground of the prosecution remain yet to be shewn and proved. The present inquiry relates to piracy as understood in the general law of nations, and as consisting, so far as the present application is concerned, in an unwarrantable violation of property committed upon the high seas.

Now

Now that this Court had originally cognizance of all such wrongs, in short, of all transactions civil and criminal upon the high seas, in which its own subjects were concerned, (and the present parties complained of are so described,) is no subject of controversy; for all history of *English* law supports it. In the reign of King *Henry VIII.* its criminal jurisdiction was in great part removed by statute to a mixt commission, where it still continues to reside. But that was the only part so removed. All the civil authority remained as before, for neither that statute nor any other affected it. All practice of its civil authority *since* that enactment proves the existence of the same practice *before*; for nothing occurred to give it new powers. All theory regarding the constitution of the Court establishes the conclusion that it must have been so. And if, from the loss or imperfection of records in times anterior to so remote a period, more ancient proofs cannot now be conveniently produced, all instances drawn from the times which have followed afford the strongest confirmation of the same conclusion, that so it was, and so it must have been, before the enactment of that statute. The cases produced by the industry of counsel are certainly posterior to the statute; but doubtless the stronger on that account—proving not only that such a jurisdiction must have existed before it, but likewise that it was unaffected either by that statute itself, or by any succeeding statute then existing; and what seals their authority the more strongly is, that upon references to the Courts of common law for prohibition, the jurisdiction has been

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28 H. 8. c. 15.

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Croke, Ellis.  
686.

Hob. Rep. 78.

1 Ventris, 173.  
2 Keble, 828.

Godbolt. Rep.  
193.

been uniformly supported; and the only question on which doubts have been entertained, (and which in one case only was otherwise determined,) was, whether goods so illegally taken, could be recovered in a *causa spoli civilis et maritima*, as well against the person who purchased them from the spoliator, as against the spoliator himself. The warrants of arrest, of which I hold seven in my hand, appear to have gone out in terms of great latitude indeed — “to arrest the goods in whatever hands they may be found, *per mare vel terram*, or to seize them, *aut provenientia a venditione eorum*, in the hands of *A. B.* of *London*, or wherever else they may be found.” This appears to have been the question in the anonymous case reported by *Croke*, and in most succeeding cases: and upon the ground that piracy does not convert property, it appears to have been generally held, in the Courts of common law, that the extent of these warrants was perfectly legal. It was otherwise held in the case of the *Spanish Ambassador v. Jolliffe and Tucker* and *Sir R. Bingley*, where *Jolliffe* and *Tucker*, the spoliators, were held bound to answer, but *Sir R. Bingley*, the purchaser, was discharged by *Lord Hobart*; but in the later case of *Egglefield*, reported both in *Keble* and *Ventris*, *Sir M. Hale* held clearly, that if goods are taken *piraticè*, and sold afterwards at land, the Admiralty hath cognizance thereof, for that which is incident to the original matter shall not take away the jurisdiction, though there were another resolution in *Bingley’s* case; and said, that one hundred such suits had been determined in the Admiralty, &c.

As to the original spoliator himself, no doubt appears

appears ever to have been stirred on the point of his liability to answer. The very doubt respecting the liability of the purchaser implies and admits it. The Hercules  
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The objections stated in argument are principally three: first, that there should be a preceding conviction of piracy. That this has not been generally required is sufficiently clear. It is true that where the Lord Admiral proceeds *pro interesse suo*, upon his royal grant of *bona piratarum*, i. e. their own proper goods, not goods of others unlawfully taken on the seas, he must shew that the party has been attainted of piracy, *Prinston and others v. the Admiralty*; but where a person, so despoiled of his own goods, proceeds merely for restitution, no such preliminary is required. Some of the proceedings here are by articles, which of themselves are of a criminal nature, and therefore could not have been preceded by a conviction. Others, as in the case of *Egglesfield* and others, merely civil, by libel, or without reference to any antecedent conviction, nor has any such antecedent conviction been traced. In the case reported in *Bulstrode*, Bulstrode, 327. (*Pelaye's* case), likewise in the 4th Institute, 4th Inst. 152. where the *Spanish* Ambassador proceeded for the restitution of *Spanish* goods taken on the high seas from *Spanish* subjects, (and the ambassador of that country appears to have been a frequent party in suits of this nature,) and where the adverse party, *Pelaye*, was a Jew, setting up a commission from *Morocco*, the Court said that he could not be proceeded against criminally, for it was not a robbery, (I presume on account of this commission,) but that they might deal civilly with him for them in the Admiralty,

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3 Bulstrode,  
p. 27; Rex v.  
Marsh; vide  
likewise, 4 Inst.  
152.

Admiralty, and that he ought to answer for them there civilly. And *per Curiam* — he may answer the suit as to the point of restitution. And it appears, as far as I can collect it, the settled law, that without a conviction the party might proceed for what is termed *the point of restitution*.

A second objection is, that no cases, later than the time of *Charles II.*, are to be found. In truth, it is hardly to be expected that they should have occurred in the common law reports, after the law had been so defined and settled in the several cases of prohibition attempted and decreed; for it could only be in cases of prohibition that they could have appeared in these books. In our own jurisdiction printed reports are only of yesterday, and little of any standing is to be found, but in the records at the Tower — many of them very obscure or imperfect, or in occasional references to tradition or personal memory, or written notes collected by former industry. It is to be observed, likewise, that piracy has long ceased to be practised in any considerable extent. There is said to be a fashion in crimes; and piracy, at least in its simple and original form, is no longer in vogue. Time was when the spirit of buccaneering approached in some degree to the spirit of chivalry in point of adventure; and the practice of it, particularly with respect to the commerce and navigation and coasts of the *Spanish American* colonies, was thought to reflect no dishonour upon distinguished *Englishmen* who engaged in it. The grave Judge observes, in a strain rather of doubtful compliment, *nulli melius piraticam exercent quam Angli*.

Sealiger.



*Angli.* But whether the numerous fleets, which in later times have been maintained by the *European* states, or the prevalence of juster notions, and gentler manners, and commercial habits, have cleared the ocean of this nuisance, the fact is certain, that the records of our own criminal courts shew that piracy is become a crime of rare occurrence, hardly visible for above a century past, but in the solitary instances of a few obscure individuals. Pirates, in the ancient meaning of the term, are literally *rari nantes* on the high seas. Under these circumstances, both of the settlement of the law and the rarity of the fact, it is no marvel that cases of piracy, turning at all upon this question of jurisdiction, should hardly present themselves at all in the later books. If the cases had occurred in fact, one sees no reason for supposing that they should not have received the same consideration to which their predecessors had been subjected.

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A third objection is, that the act of piracy, being a crime, could not be considered by the common law as the proper subject of a civil suit for restitution. And it is certainly a known principle of the common law, that a civil suit cannot be founded on a felony, for that would approach to what is termed a compounding of a felony. The civil demand merges in the felony. The common law rather, perhaps, considers that demand as in the nature of a debt arising upon something like a contract, and *ex maleficio non oritur contractus*. Whether this principle was imported (though with a more technical meaning) in the civil law, (where I am not certain it is to be found in terms,) or whether

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*Passim.* Pleas  
of the Crown,  
Part I. 388;  
Part II. 18 and  
370.

whether this mode of considering the demand as merged, is not a principle coeval and congenial with the fundamental principles of the common law itself, is more than I can presume to say. But I take the rule to be confined to such *maleficia* as the law technically considered as felonies, or as felonies and something more than felonies, as high treason. To misdemeanors, or other offences differently qualified, the policy of the law has not applied it. Now piracy is certainly not considered as a felony at the common law. It is expressly so laid down by Lord *Hale* — *pardon of all felonies reacheth not piracy*. The principle, therefore, does not reach it, at least in its ordinary extent; and looking to what has taken place in the cases of prohibition alluded to, I am led rather to infer that it could not be extended to a crime belonging to, and defined by, another system of jurisprudence, and where reasons of legal policy and convenience rather appear to oppose its introduction; for though the law may very justly and commodiously apply its own peculiar principles to its subjects in their ordinary transactions, governed immediately by its own rulers; and may, therefore, compel such individuals to give up, *pro publicâ vindictâ*, and for the protection of the community, their own private claim of indemnification for any wrong they may have suffered, it by no means follows, that where the wrong done is *contra jus gentium*, and the foreign sufferer, standing upon that law, requires a reparation, the common law of this country would impose upon him the burthen of sacrificing his private rights, so founded, to the duty of protecting the interests of the country of

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of the offender, by confining the whole of his remedy to the useless privilege of a criminal prosecution. As far as I am enabled to infer from the cases of attempted prohibitions, the common law has made no such demand, but has admitted the prosecution of a civil suit for the *point of restitution*, either exclusively of a criminal prosecution, or in conjunction with it. Upon the whole view of the subject, both in its theory and practice, I cannot think myself justified, however weighty reasons, both public and private, might in this particular case induce me to wish it otherwise, in renouncing the jurisdiction contended for. I would only observe, that as no small portion of the authority on which it stands is borrowed from the books of the common law, it might not, perhaps, be unfit to resort to the opinion of those Courts which administer that law. The learned persons who preside in them are better able to explain correctly, and apply satisfactorily, their own principles and judgments, than I can be supposed to do. But judging for myself, upon the evidence adduced, I think I am bound not to abdicate a jurisdiction, which, whatever be the circumstances of the present case, may be very usefully and beneficially employed in these cases, and which appears to me to stand upon fair foundations of reason and usage, and I therefore decree both the warrants to issue.

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Some further proceedings were had in this case, but owing to a compromise which took place between the several parties, it did not again come on for discussion.

## MARY, CROFTS.

July 2d, 1819.

Whoever  
receives prize  
proceeds is re-  
sponsible for  
them to the  
captors.

**T**HIS was a proceeding by monition, calling on Messrs. *Birch, Rohde, and Cheveley*, merchants in *London*, to pay over to the captors of the above vessel the sum of 2,659*l.*, the amount of the proceeds, alleged to have been received by them from Mr. *Molloy*, the registrar of the Vice Admiralty Court of *Antigua*, residing in *London*, which was opposed on the ground that they had not actually received the whole, but only a part to the amount of 562*l.* Mr. *Molloy* having, on payment of the proceeds, detained the sum of 2,097*l.*, being the amount of two bills of exchange drawn by Messrs. *Black and Hay* of *Antigua*, who were the agents to the captors, and of whom Messrs. *Birch* and Co. were the correspondents in *London*. The question for the consideration of the Court was, whether Messrs. *Birch* and Co. were authorised in suffering such detention; and having done so, whether they were not liable to the captors for the payment of it.

## JUDGMENT.

Sir *W. Scott*.—Prize property is of a very sacred nature, and whoever takes it into their possession is responsible to the captors for it. The vessel in question was captured in the month of *March* 1808, by his Majesty's ship *Hazard*; taken to one of the *West India* islands, and proceedings instituted

The *MARY*.

July 2d, 1819.

tuted against her in the Vice Admiralty Court of *Antigua*, where she was condemned on the 25th of the same month. An appeal was entered against such condemnation, which was afterwards abandoned. The proceeds were paid into the Vice Admiralty Court, and on the abandonment of the appeal, remitted to Mr. *Molloy*, the principal registrar of that Court, then resident in *London*. Pending the appeal two bills, one for 1,000*l.* and the other for 1,097*l.*, drawn by Messrs. *Black* and *Hay*, were presented for acceptance to Messrs. *Birch* and Co.; acceptance was refused, and Messrs. *Black* and *Hay* apprised of it. These bills had no connection whatever with the prize transaction. In the spring of 1809, Messrs. *Birch* and Co. received a letter from their correspondents at *Antigua*, enclosing a power of attorney, authorising them to receive the proceeds of the ship *Mary* from Mr. *Molloy*; on application to Mr. *Molloy*, it turned out that he was in possession of these bills, which had been protested, and he declined paying over the proceeds, unless he was permitted to deduct the amount of the two bills; this was ultimately agreed to, and Messrs. *Birch* and Co. received from him the sum of 562*l.* Thus stands the case, and there is no doubt but Messrs. *Birch* and Co. have fixed themselves with the responsibility. On their application to Mr. *Molloy*, they have acted with a very undue want of caution. Mr. *Molloy* had no authority to make a demand on this property, for debts arising out of quite a different transaction: it was not the property of Messrs. *Black* and *Hay*, but of the captors. Would this Court have suffered its registrar

**The MARY.**

**July 2d, 1819.**

to have done so? Most certainly not; and the plan which Messrs. *Birch* and Co. should have adopted, would have been to apply to a court of appeal to decree him to pay it, which would have been immediately done; it would never have suffered a registrar to mix up a private transaction with a prize case. This not being done, who were to be the sufferers? It was through the improvident act of these gentlemen that the loss had occurred, and they must therefore bear that loss; they had granted an indulgence which they had no right to do, and which they had no authority to do, and therefore they must be the sufferers. It would be acting with too much severity to compel them to pay the interest usual on such occasions; I shall, therefore, only pronounce for the sum of £,659<sup>4</sup>/<sub>4</sub>, the principal.

## FELICITY, SMITH.

**T**HIS was the case of an *American* ship, which originally sailed from *Charleston* with a cargo of rice for *Cadiz*, where she arrived about the end of *May* 1813, and delivered her cargo. At *Cadiz* she took on board a return cargo, consisting of wine and fruit. She sailed therewith on the 31st *October* 1813, bound for *Boston*; but having met with bad weather, and sprung a leak, and being in great distress, 900 boxes of raisins were, between the 14th and 16th of *December*, thrown overboard. The leak still continuing, and the vessel being within 100 miles of the *Bermudas*, the master and crew resolved to steer for those islands, and approached within seven leagues of them; but the wind proving adverse, it was determined to shape the course of the vessel for *Charleston*. On the 1st *January* 1814, they fell in with his Majesty's ship *Endymion*, *Henry Hope* esquire, commander, it blowing at that time a strong gale. The *Endymion* immediately hoisted *English* colours, and fired a gun, for the purpose of bringing to the *Felicity*, which hoisted *American* colours. About eleven o'clock, A. M., Lieutenant *Ormond* and a boat's crew of the *Endymion* boarded the said ship, and found her in a leaky state, with her sails split, and her rigging in an unserviceable state, and otherwise much disabled. *Smith* the master then went on board the *Endymion* with his papers, when the same were inspected and ex-

Nov. 26th,  
1819.

If a captor destroys a ship for which a British licence has been granted, he or his Government is responsible for the loss occasioned by such destruction; but if the existence of the licence was not disclosed to him by those whose duty it was to inform him, and he had no sufficient means to inform himself, he is exempt from responsibility.

The *Felicity*.

Nov. 26th,  
1819.

mined by Captain *Hope*; and there being no licence, Captain *Hope* asked the master if he had any such document, when he declared, and several times repeated such declaration, that he had no licence, and that he was otherwise unprovided with any protection. The state and condition of the *Felicity*, at the time she was so fallen in with was such as to raise considerable doubt whether she could, without assistance from the *Endymion*, reach a *British* port in safety; and Captain *Hope* was unwilling to lessen the number of his officers and crew, in consequence of the service upon which the *Endymion* was then specially engaged, — she having been detached, by Admiral *Warren*, to watch the movements of the *American* ship *President*, then lying ready for sea at *Rhode Island*; the *Endymion* being the only *British* frigate upon that station of corresponding force with the *President*. Under these circumstances, Captain *Hope* informed the master of his determination to destroy the ship and cargo; and Lieutenant *Fanshawe*, who was dispatched by Captain *Hope* for that purpose, enquired of the supercargo and mate of the *Felicity* if there was any licence, who assured him that no such document existed, so far as they knew of; and the trunks and baggage being removed, Lieutenant *Fanshawe*, in pursuance of a preconcerted signal from the *Endymion*, set fire to the *Felicity*. When the master perceived the vessel to be on fire, he called for his chest, and from a concealed place produced a paper, purporting to be a licence, and requested Captain *Hope* to put him again on board his ship. This, however, was wholly impracticable, from her then burning state, and the extreme



treme difficulty of communication, there being a heavy sea, and the gale having increased so much that the cutter of the *Endymion* was stove, and the boats could not lay alongside.

The *Frisco*.

Nov. 26th.  
1812.

A claim was given by *C. Coolidge* of *Boston* in *Massachusetts*, an *American* citizen, for the ship and cargo, as the property of citizens of the United States of *America*, protected from capture by a licence, granted by his Excellency Sir *Henry Wellesley*, his Majesty's envoy extraordinary and minister plenipotentiary at the court of *Spain*, in pursuance of an order in council bearing date the 13th *April* 1812, on board the said ship at the time she was seized by the *Endymion*.

#### JUDGMENT.

Sir *W. Scott*. — The present question arises upon the destruction of an *American* ship, which took place on the 1st *January* 1814: no proceeding whatever is commenced till 18th *October* 1818, nearly five years afterwards. So long and inconvenient a delay requires to be accounted for; and I cannot say that the account given is satisfactory. Nothing is stated that should have forbidden the institution of this suit immediately on the cessation of hostilities between *Great Britain* and *America*, or indeed long before, if the owners of this ship thought she was protected by a licence, as is now alleged. The absence of some of her owners from *America* is no justifying reason, for surely the resident owners, who as such must have had the general management of the ship, were sufficiently authorized to apply for the redress of any injury to their common property. The dependence of another suit,

The *Furber*.

Nov. 26th,  
1819.

somewhat similar, is as slender a justification; for that case depended, as this does, upon its own peculiar circumstances, and could not at all affect the general rule of justice; which clearly prescribes, that if a neutral ship, or protected ship, is destroyed by a captor, either wantonly or under an alleged necessity, in which she herself was not directly involved, the captor or his government is answerable for the spoliation. There was no occasion to wait for a determination to establish that rule, and still less to wait for the actual payment of the money which was decreed to the sufferer in that case. What is still more to be lamented in the present case, is, that no evidence whatever is collected till the year 1818, when the first affidavit is made. It is said that the captors have not suffered by it, as they produce plenty of witnesses. It is fortunate for them that these witnesses are not dead or dispersed. It might have been otherwise. But the complainants may have injured themselves; their two mates, they allege, are dead, and their mariners must be dispersed, for none are produced. The only witness who speaks to the necessary fact is their supercargo; and they have certainly humiliated their own case by confining it to his single testimony.

This ship and cargo, *American* property, were destroyed by Captain *Hope* of his Majesty's ship *Endymion* on the 1st of *January* 1814, being then in the prosecution of a voyage from *Cadiz* (where she had carried provisions) to *Boston*, where her owners resided. She had encountered a continuance of most tempestuous weather, and had suffered most severely under it, so as to make it  
more

more than doubtful whether she could possibly reach *America*. Under a strong sense of their danger, they had determined, upon a general council of the master and mariners, to make for the island of *Bermuda*, but were baffled by the opposition of a head-wind, and compelled to resume their course to *America* in their shattered condition; and under the unsettled and boisterous weather which belongs to that season of the year in such latitudes, she is met with by his Majesty's ship *Endymion*, Captain *Hope*, by whose orders she was destroyed, after her captain and crew, with their baggage, were removed on board the *Endymion*, and after other transactions to which I shall have occasion to advert.

The *Prisoner*.

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Nov. 26th,  
1819.

Taking this vessel and cargo to be merely *American*, the owners could have no right to complain of this act of hostility, for their property was liable to it, in the character it bore at that period of enemy's property. There was no doubt that the *Endymion* had a full right to inflict it, if any grave call of public service required it. Regularly a captor is bound by the law of his own country, conforming to the general law of nations, to bring in for adjudication, in order that it may be ascertained whether it be enemy's property; and that mistakes may not be committed by captors, in the eager pursuit of gain, by which injustice may be done to neutral subjects, and national quarrels produced with the foreign states to which they belong. Here is a clear *American* vessel and cargo, alleged by the claimants themselves to be such, and consequently the property of enemies at that time. They share no inconvenience

*The Phoenix.*

Nov. 26th,  
1819.

venience by not being brought in for the condemnation, which must have followed if it were mere *American* property; and the captors fully justify themselves to the law of their own country, which prescribes the bringing in, by shewing that the immediate service in which they were engaged, that of watching the enemy's ship of war the *President*, with intent to encounter her, though of inferior force, would not permit them to part with any of their own crew to carry her into a *British* port. Under this collision of duties nothing was left but to destroy her, for they could not, consistently with their general duty to their own country, or indeed its express injunctions, permit enemy's property to sail away unmolested. If impossible to bring in, their next duty is to destroy enemy's property. Where doubtful whether enemy's property, and impossible to bring in, no such obligation arises, and the safe and proper course is to dismiss. Where it is neutral, the act of destruction cannot be justified to the neutral owner, by the gravest importance of such an act to the public service of the captor's own state; to the neutral it can only be justified, under any such circumstances, by a full restitution in value. These are rules so clear in principle and established in practice, that they require neither reasoning nor precedent to illustrate or support them. In the present case it is contended, that the hostile character was disarmed by a licence; and I see no reason to dispute either the existence of the licence, or its authority. It had been granted under circumstances that have been justly described as highly favourable. The vessel had carried

The *Harriet*:

No. 26th.

1810.

ried a most seasonable supply from *America* to *Cadiz*, a city much connected with and protected by this country during the severe pressure of our war with *France* for the liberation of *Spain*, of which this city had become the only remaining stronghold. She had undertaken this duty, under the dangers of a heavy responsibility to her own country, then at war with *Great Britain*; and having successfully performed it, was returning home, under the protection of a renewed licence from the *British* minister at *Cadiz*. It is not to be denied, that these facts create claims of a very strong and commanding nature—claims which are quite irresistible, if urged in a proper manner. And the only question is, whether these claims are so brought forward as to affect the captor with responsibility? I take it to be clear, that if the captor knew of this licence, either from its production or from other circumstances which ought to have satisfied him of its existence, he is liable to the whole extent of the mischief done, which is estimated at the sum of 12,000*l.* It is as clear a proposition, that if the existence of the licence was not disclosed to him, by those whose duty it was to inform him, and he had no sufficient means to inform himself, he is not a wrong-doer. The act, if tortious, is the act of the persons who withheld the information they were bound to have given him before the act of destruction took place. If they held out the ship and cargo to be enemy's property, he had still more right to treat it as such. There is no case in which the rule, *de non existentibus et non apparentibus*, can more justly apply, than where a man is called upon to answer

The *Endymion*.

Nov. 26th,  
1819.

answer for a loss occasioned by the act of concealment of the complainant himself. If a ship, armed with a protecting licence, which is not alleged or produced at the time of capture, is brought in under circumstances that did not at all compel and authorize an immediate destruction, the Court would subsequently restore that vessel, but it would indemnify the captor to the utmost extent of all the expence he had been put to by that act of concealment or denial. The ship in this case being destroyed, cannot be restored; but if she was justifiably destroyed, under an ignorance produced by such an act, the Court owes the captor the same protection to the fullest extent. These are the principles which I must apply to this issue of fact, *Was the knowledge of this licence communicated to the captor, or was it necessarily to be inferred by him before the act of destruction took place?*

I shall, for the sake of convenience, first examine the depositions of the captors, there being in fact only one witness on the other side.

Captain *Hope* deposes, that “at half past eight o’clock, in the morning of the 1st of *January* 1814, it blowing at that time a strong gale from the northward and westward, a strange vessel was observed from the *Endymion*, to which chase was immediately given; that the *Endymion* hoisted *English* colours and fired a gun at the said chase, upon which she hoisted *American* colours and hove to, and about eleven o’clock, *Lieutenant Ormond*, with a boat’s crew, was directed by the deponent to board and examine the said strange sail, when she was found to be the ship *Felicity*, *George Smith* master, of the burthen of 318 tons, with a crew

The *Frigate*.Nov. 20th,  
1819.

crew of thirteen men, and laden with a cargo of wine and fruit, bound from *Cadiz* to *Boston*; that Lieutenant *Ormond*, on his return, reported to the deponent, that on boarding the said ship he found her leaky, with her sails split, and her rigging in an unserviceable state, and otherwise much disabled; and the deponent further made oath, that the said *George Smith*, the master, having been brought on board the *Endymion*, with the papers of the said ship, the same were particularly inspected and examined by the deponent, when finding no licence or other document amongst the said papers, to exempt the said ship from *British* capture, the deponent inquired of the said *George Smith* if he had any such document on board, when the said *George Smith* declared to the deponent he had no licence, and was otherwise unprovided with any protection for the said ship; and the deponent further made oath, that the state of the said ship, when she was so fallen in with by the *Endymion*, was such as to make it a matter of considerable doubt whether she could reach a *British* port in safety, independent of the difficulty which the deponent felt in lessening the number of his officers and crew, with reference to the service upon which the *Endymion* was then particularly engaged, namely, the watching the *American* frigate *President*—the *Endymion* being at that time the only *British* frigate that was considered of force sufficient to cope with the said *American* frigate; the deponent, in consequence thereof, informed the said *George Smith* of his determination to destroy the said ship and cargo, for which purpose Lieutenant *Fanshawe* was directed by the deponent,

*The Felicity.*

Nov. 26th,  
1819.

deponent, in the presence and hearing of the said *George Smith*, to proceed on board the *Felicity*, and send the trunks and baggage of the master and officers, and also the crew, to the *Endymion*, and upon a signal being made by the deponent to set fire to her; that after the said trunks and baggage had been so removed on board the *Endymion*, and no licence having been produced or found, the preconcerted signal was made to the said Lieutenant *Fanshawe*, who accordingly set fire to the said ship, and prepared to abandon her, which was immediately afterwards done; and the deponent further made oath, that during the time taken in removing the crew and baggage to the *Endymion* there was a heavy sea, and the gale increasing, and it was with much difficulty that boats lay alongside, and the communication between the said vessel had become so dangerous that the cutter of the *Endymion* had been stove in communicating with the *Felicity*; and the deponent further made oath, that on the said *George Smith* perceiving his said ship to be on fire, he called for his chest, and from a concealed place therein produced a paper purporting to be a licence or protection for the said ship from *British* capture, and at the same time required the deponent to put him on board his said ship, but which, from her burning state, added to the extreme difficulty of communication, was then utterly impracticable."

Lieutenant *Ormond*, the officer who went on board the *Felicity*, fully confirms the account given by Captain *Hope*; he says, "that the said *George Smith* the master, together with the papers of the said ship, were particularly inspected and  
examined



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The *Endymion*.

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Nov. 28th,  
1819.

examined by him ; and finding no licence or other document amongst the said papers to exempt the said ship from *British* capture, this deponent inquired of the said *George Smith*, whether he had such a document on board, when the said *George Smith* declared to the deponent he had no such licence, and was unprovided with any protection for the said ship ; that the deponent, on receiving this information, took the said master and papers on board the *Endymion*, when nearly the same interrogation took place between Captain *Hope* and the said *George Smith*, and the same answers given ; and the deponent further maketh oath, that the state of the said ship, when she was so fallen in with by the *Endymion*, was such as to make it a matter of considerable doubt, whether she could reach a *British* port in safety, independent of the danger attending the weakening of the officers and crew of the *Endymion*, while employed on the service of blockading an enemy's ship, so superior in force to the said *Endymion* ; in consequence thereof, Captain *Hope* informed the said *George Smith* of his intention to destroy the said ship and cargo ; for which purpose Lieutenant *Fanshawe* was directed by Captain *Hope*, in the presence and hearing of the deponent and likewise of the said *George Smith*, to proceed on board the *Felicity*, and send the officers and crew, together with their clothes or other property, to the *Endymion*, and, upon a signal being made by Captain *Hope*, Lieutenant *Fanshawe* was to set fire to her ; that after the said officers and crew, together with their clothes and other property, had been removed on board the *Endymion*, and no licence having

**The *Felicity*.**

**Nov. 20th,  
1819.**

having been produced or found, the preconcerted signal was made to the said Lieutenant *Fanshawe*, who accordingly set fire to the said ship, and abandoned her; and the deponent further maketh oath, that during the time taken in removing the crew and baggage to the *Endymion*, there was a very heavy sea running, (and every appearance of the gale increasing,) so much so that it was found necessary to run in the main-deck guns to prevent the boats being destroyed alongside; and in short, the communication had become so dangerous, that the cutter of the *Endymion* had been absolutely stove, and the lives of the crew endangered, in communicating with the *Felicity*; and the said deponent further maketh oath, that on the said *George Smith's* perceiving his said ship to be on fire, he called for his chest, and from a concealed place therein produced a paper, purporting to be a licence or protection for the said ship from *British* capture, and at the same time requested Captain *Hope* to put him on board his said ship, but which, from the burning state, added to the extreme difficulty of communication before said, was deemed then utterly impracticable."

Lieutenant *Powney* says, that " he was on board the *Endymion* when *George Smith* the master came from the *Felicity*, and was with others of the officers on the quarter-deck of the said ship, and present when inquiry was made by Captain *Hope* and others of the said *George Smith*, whether he was provided with a licence or protection for his said vessel; that the said *George Smith* did upon many such occasions, in answer to such inquiry, positively deny, in the presence and hearing of  
the

the appearer, that he was possessed of any licence or protection for his said vessel; that the said Captain *Hope* urged the said *George Smith* to produce a licence, if he was possessed of any, stating as a reason, that he should feel it his duty to burn the said vessel, in case she was not so protected."

The rest of his deposition is to the same effect as those of Captain *Hope* and Lieutenant *Ormond*.

Lieutenant *Fanshawe* likewise deposes to the same facts; he says, "that the said *George Smith* was, soon after his so coming on board, interrogated by the appearer himself, whether he had a licence from the *British* government for his then voyage; that the said Captain *Smith* repeatedly denied to the appearer having any such licence; that he described and stated his vessel to be in great distress, namely, in want of provisions, very leaky, her sails split, and otherwise damaged; that he this deponent was sent on board the *Felicity*, in the afternoon of the same day, with orders to inquire and discover if any licence was on board, and if none was found or delivered up, to send the crew on board the *Endymion*, and on a signal being made from the said frigate, this deponent was directed to set fire to the ship, she being not considered seaworthy to send to a *British* port; that this deponent finding no licence on board, and getting no intelligence of any, accordingly sent a part of the crew, with the master's trunks and other things, on board the *Endymion*, and on or soon after the boat had returned from the *Endymion* for the remainder of the crew of the *Felicity*, the signal was made from the *Endymion* to this deponent to fire the ship, which he

The FELICITY.

Nov. 26th,  
1819.

immediately put into execution; that the orders this deponent received from Captain *Hope*, to send the crew on board the *Endymion*, and to set fire to the *Felicity*, in case no licence was found on board or produced, were given and delivered to this deponent in the presence and hearing of the said Captain *Smith*, who must have distinctly heard and understood the same; that the said Captain *Smith*, notwithstanding, suffered and permitted this deponent to leave the *Endymion*, and proceed in the execution of his orders, without producing such licence, or giving any information whatever as to the existence of a licence, although this deponent had required it of him as before stated, and had been positively informed that no licence was in existence; that on this deponent getting on board the *Felicity*, he inquired of the supercargo and mate of the said vessel, if there was any licence for the voyage, and was told repeatedly that they knew not of any such."

What possible end was to be answered by this wanton act of destruction, which could only occasion loss to themselves, by making them liable for the full value of the ship and cargo? The present inconvenience itself was quite sufficient to deter them. They were going to fight an *American* ship of war, of much superior force; to take on board their ship fifteen *American* seamen, at such a time, must have been highly undesirable. No visitors could be more unseasonable. Here was no particle of profit to be acquired; but this additional crew to be lodged and fed till they could tranship them. No resentments to be gratified. They must have been disposed to treat favourably persons who had been

so

so favourably employed ; and they did treat them tenderly — took them on board, bag and baggage, and afterwards put them on board a ship going to their own country.

The *FELICITY*.

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1819.

Such is the representation given by these officers, and such the circumstances under which they appear to have acted. What is the representation on the other side? It is, in all reason, to be *primarily* and *principally* expected from the master. He is the person to whom the licence is sworn, by the supercargo, to have been delivered by the supercargo himself, *to be produced and shewn whenever occasion might require*. He has it concealed in his possession. He lugs it out at last from its hiding place. He is the principal actor, and therefore ought to be the principal relator in the business. What does he say? In his protest, not a word ; it is said that this was for fear of *American* penalties upon the disclosure. May be so ; but the fact is, he says nothing there. There is another affidavit, dated *September* 1818. One would have expected, of course, a most circumstantial detail of his own transactions. This affidavit was to be his own vindication ; it was to be a most grave charge upon *British* officers — to found proceedings against them in a *British* court of justice ; it was to be ultimately the exoneration of his own employers from a most heavy loss, occasioned by a most unjust act. A man must have an understanding singularly obtuse, not to perceive and feel the necessity of laying himself out, in a most ample and accurate relation of the material fact. Observe what he says, *the licence was produced and shewn by me to Captain Hope, as soon as I was convinced*

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*that*

The *FELICITY*.

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1819.

*that the frigate was British and not American.* But when this conviction flashed upon his mind, after hours of incredulity and doubt, the very point to be shewn, when and how these doubts were silenced, he leaves totally unrecorded. What he says is no contradiction to the officers. They say he produced the licence; so says he. They say not till after the ship was set on fire. He does not contradict this; for he does not venture to say that this conviction reached his understanding before. It is in perfect unison with their account.

It is said truly, that an *American* master must be under great difficulties in such a situation. Those who take these licences take them subject to these difficulties, and in confidence that those who use them on their behalf will use them with reasonable discretion? Is the conduct of this man reconcileable with the humblest description of such a discretion. He, by his own admission, is for hours under the belief this was an *American* frigate; for he admits, that he was never convinced till after his own friend came on board; neither the ship itself which he was on board of for hours, nor the officers with whom he was conversing, moved his understanding at all. He resists all proof. If persons will employ those whose intellects travel so very slow, they must take the consequences. When he is called upon, by the necessity of the case, to state when they did arrive at the proper conclusion, or what effected it, he is totally silent. The man is too wise and too cunning for his situation. He has that *superabundans cautela* which is more allied to folly than discretion.

If the master, who is the depository and producer

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ducer of this licence, will not declare at what time it was produced, I hardly think any other evidence to that question of time could be admissible with effect. But there is another witness, the supercargo, who has made three affidavits, in which the case on that side is wholly comprised; for when the claimant steps out of them, he steps into empty space. In both the first and second affidavit he describes exactly as the master does; "the licence was produced by Captain *Smith*, as soon as he ascertained that the *Endymion* was a *British* and not an *American* frigate." In the third affidavit, he does not advert to any act of the Captain at all. This is the sum of his evidence respecting the acts of the master, to *whom he himself had delivered the licence, to be produced and shewn whenever occasion might require.* The total want of any such proof on the part of the master, is to be supplied by the proof of his own acts. If such proof was even credible in itself, it would hardly answer such a purpose. Because if this person *declared* ever so strongly that the master had a licence in his possession, and the master solemnly denied the fact, and neither produced the licence, nor accounted for the non-production, which of the two was to be believed? The master, undoubtedly. *He must* know whether he was or was not the depository of the licence; and if *he* positively disclaimed it, the other man's assertions could never force the fact of such a possession upon him. But the whole account given by this *Thayer* does not wear the least colour of truth. In the first and second affidavit, he only says in general, that *he did repeatedly, before the signal for burning was*

*given,*

The *FELICITY*.

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*given, assure Captain Hope that he had a licence.* In the third, he is more particular as to his own conduct. He says, that when *Ormond* came the second time, *he took him aside and informed him that Captain Smith and himself had nothing to fear from a British, but only from an American frigate, for that they had a British licence ; he said so from a conviction in his own mind, that it was a British frigate, although the Captain had expressed some doubts of it.* How his intellects travel so much quicker than the master's, *non constat.* He had not been on board ; and he had conversed with only this one officer, and yet is convinced, though Captain *Smith* was unconvinced, and remained so, after being on board for two or three hours, and conversing with Captain *Hope* and his crew. Nothing, however, can be more incredible than that any such conversation passed ; it is very unlikely that the master and supercargo should not be in the same story. If it had, these consequences *must* have followed. First, that the lieutenant must have challenged the master with it, and confronted him with *Thayer*. It could not naturally be otherwise. He must likewise have reported it to Captain *Hope*, who must have interrogated and confronted them in like manner. Nothing of this sort passed. *Thayer* gives this important information to Lieutenant *Ormond*, and he keeps it as a secret most guardedly. This is not natural conduct. In two hours after, the fourth lieutenant comes and tells him the ship is to be burnt ; upon which he tells this same secret to this gentleman, who is as good at keeping a secret as his predecessor. On getting on board *he and both mates told Captain Hope the same thing, that*  
*Captain*



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*Captain Smith had a licence in his possession.* Is it possible that this should have passed, and that no further examination should have been pursued? All passes *sub silentio*, without calling these two persons to account for this direct contradiction? It is perfectly clear that at this time *Captain Smith*, who had been long on board, had made no such disclosure. He was persisting in his denial, because *Thayer* would never have made such a communication, if it was already notorious, as it must have been, in consequence of the master's disclosure. It is evidently to apprise them of something which they did not know before. The master must have, down to this period, kept the same obstinate silence. It is, therefore, in itself most highly improbable, and hardly requires any confutation beyond that which it receives from itself. If this be so, there is no occasion for resort to *any opposing* evidence. The case of the officers might be trusted to the affidavit of their opponents. But in addition to the mass of contradictory evidence already stated, here is a second affidavit of *Captain Hope*, which gives a most distinct and direct contradiction to the assertions of this person *Thayer*.

Of all the evidence, therefore, respecting the indication or production of a licence in *proper* time, the fair result is, that no such fact took place in either form, till it was too late to prevent the burning; but it is said that *Captain Hope* might have presumed from circumstances, independent of any such fact — a very unfair duty imposed upon *Captain Hope* of presuming and acting upon his own presumptions, in direct opposition to the

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asseverations of the other party. But what are these circumstances? It is said that he must have seen from the papers that the ship had brought the cargo to *Cadiz*, which she could not have gone to without a licence. In the first place, if that was to be a disguised transaction, it would have been disguised in the papers themselves; they would have been manufactured up to the case, and have concealed all intercourse with *Cadiz*. In the next place, I am yet to learn that an *American* ship, laden with supplies of provisions for *Cadiz*, might not have found her way there without any *British* licence. *Cadiz*, a besieged city, was in *Spanish* possession, and under *Spanish* administration, though assisted in the defence by *English* auxiliaries. *America* had no quarrel with *Spain*, and would find there, in that state of privation, an excellent market for her own products of that species; and I cannot suppose that these *English* auxiliaries would be at all forward to molest the vessels which brought them there for *Spanish* and *British* consumption. I am the more inclined to think so, because I see the protest, made immediately upon the return to *America*, avows without reserve the sailing from *Cadiz*. If the necessity of a *British* licence to enable an *American* ship to go to *Cadiz* was so evident in itself, how comes it to be avowed upon this protest, without any fear of drawing the notice of the *American* authorities, and all the penal vengeance of their law, which is said to have been provided for such disloyal transactions?

Upon the argument of probabilities applying to conduct, I had already occasion to observe upon  
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the gross improbability of the captors having any disposition, upon any ground whatever, to destroy a licensed vessel, known by them to be such. For the conduct of the other parties, folly and obstinacy furnish a sufficient solution ; but if it were necessary to go at all further, one solution occurs, which, if not real, is at least not unnatural. Here was a ship in a state of most menacing distress ; her people had unanimously felt the absolute necessity of making for the nearest port. Baffled in that attempt by a head-wind, they are obliged, in a most crippled state, to resume their course for the distant port of *Charleston*. They fortunately meet the *Endymion*, and though the carpenter of the *Endymion* patches up a leak as well as he could in a short space of time, in boisterous weather, and in a loaded ship, yet that they should feel any thing rather than an inclination to commit their lives in this crazy vessel to the perils of such a voyage, after all they had already suffered and apprehended, the weather growing more boisterous and threatening, is not at all improbable. It must appear a most fortunate escape from a situation, dolorous and dangerous in the extreme, to a state of safety and comfort on board such a ship as the *Endymion*. They could have no apprehension of being detained as prisoners of war, because they could not but know, that the moment they produced their licence they would receive all the kind treatment they afterwards actually experienced. The return they make for this kind treatment is this ; after being sent safely home, being taken to task by their owners for the desertion of their ship and cargo, they trump up  
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this history of spoliation. The master is either too honest or too modest to support it. The supercargo, a man of firmer nerves, marches up to it, but unfortunately gives his account in a way that totally destroys its credibility.

Proposing this solution conjecturally, I say no more of it, than that it furnishes an explanation of many circumstances, that appear otherwise unintelligible. But I am not compelled to resort to any solution of the facts, provided I am satisfied of their reality. The important question of fact is, did these persons hold out this ship as an unprotected ship, and thereby authorise Captain *Hope* to deal with her as an enemy, till after the act of destruction was beyond prevention or remedy? I am of opinion that it is clearly proved that they did so, and I therefore assoil the captor of all responsibility, and condemn the claimant in the costs of this proceeding.

## ELIZABETH, GULL.

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**T**HIS was a suit brought by *Henry Brokershaw*, a seaman, for wages earned on board this brig, which sailed from the port of *London* to *Saint Petersburg*, and took in a cargo of deals and hemp there, and was proceeding on her voyage home, when, on the 26th of *September* 1818, she went on shore, on a reef of rocks, near the island of *Gothland*: assistance was immediately rendered to the brig by "the *Swedish Diving Company*," belonging to that island, who employed other persons as well as the crew in unloading the cargo and getting the brig off the rocks, which they effected, and carried her to *Ostergam*, where she was laid on shore for the purpose of being examined. In consequence of the damage she had sustained, the brig again filled with water and suffered further material injury, so as to make her incapable of returning home until she had undergone repairs, which could not be completed whilst the season for navigating the *Baltic* lasted. Under these circumstances the master called the crew together, and proposed to them that they should be discharged and return to *England*. On the part of the owner, it was alleged, that the crew, among whom was *Brokershaw*, the party now suing, having deliberated upon the proposal of the master, voluntarily accepted their discharge. On the other side, *Brokershaw* alleged that he did not voluntarily

By the general rule, a master is not at liberty to discharge his crew in a foreign port without their own consent, but circumstances may vest in him an authority to do so, upon proper conditions.

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tarily accept his discharge, but that he and the rest of the crew remonstrated with the master, and stated distinctly to him, that having signed articles for the whole voyage they were entitled to remain by the vessel, and to return in her to *England*; upon which he repeated his determination of sending them home, stating, that from that day they were no longer to consider themselves as belonging to the ship, or under his charge; and on a further remonstrance from them, he declared that if they were not satisfied they might have recourse to the laws of their own country for redress; that he had provided carriages to convey them and their luggage to *Wisby*, that they were consequently compelled to proceed to *Wisby*; that on their arrival there, the agents of the vessel supplied them with a pass, which had been previously procured by order of the master, and was waiting their arrival at that place; and that they accordingly received the pass, and proceeded to *England*.

## JUDGMENT.

Sir *W. Scott*.—*Henry Brokershaw* (who sues for his wages) entered on board this ship in a *British* port for a voyage to *St. Petersburg* and back to *Portsmouth*, in *June* 1818. She arrived safe at *St. Petersburg*, and took a cargo of hemp and deals for *Portsmouth*, and on the 25th of *September* sailed. On the 27th, without the default of any person, and owing to the extreme darkness of the weather, she ran on shore on the *Isle of Gothland*. The crew, aided by a company of *Swedes*, got her off, in a damaged state, and carried her

her into port for repairs. On the 21st of *October*, the crew were discharged by the master, who told them he discharged them because the ship could not be repaired in time before she would be blocked up by the ice, and therefore it was necessary, in order to save the expence of maintaining them the whole winter there. The master's plea states, that the discharge took place upon the proposal made to the crew, who accepted it, after deliberation; that they were conveyed to the ports of *Wisby* and *Elsinore*; from thence, it appears, they embarked for *London*, where they arrived in *January*. They applied to the owners for the wages, which they insisted were due, up to the time of the *Elizabeth's* return to *England*, which was not till the *April* following, under the care of a *Swedish* crew, picked up at *Gothland*. The owners contend, that they are bound to pay only up to the time of the actual discharge, so accepted by the crew in *October* at *Gothland*; and the tender of wages is made upon that view of the matter. The seamen deny that the discharge was accepted in any manner that can be deemed to bind them with the force of a voluntary contract. This is the first matter to be considered; because if it is established, it disposes of the whole case. The maritime law of any country is averse to the discharge of native seamen in foreign ports; but if it be entirely with their own consent, it cannot, upon common principle, be deemed an injury of which *they* can have a right to complain.

Now, looking into the evidence on both sides, I think this cannot be deemed by any means a voluntary acceptation of a discharge. For how is it

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it proposed? In a form that admits of no liberty of refusal; for it is only in the alternative, that if they do not accept the discharge, they must starve in the foreign country; the acceptance of a discharge so proposed is submission to a threat, and no better; it is a mere abuse of language to call that a voluntary act. It is a preference of evils, of which a man is compelled to take one. If, therefore, the matter rested *there*, there would be an end of all question; and I am told that it must end there, because the defendant has rested his defence on that ground only; and so he has *formaliter*. But I think the consequence by no means follows, that he is excluded from all other equitable defence, if any such is to be found in the admitted facts of the case. In a Court of common law, where issue may have been joined on a special matter, such a proceeding might not consist with the strictness of the forms of that law; but in a Court like this there may be an obligation upon it, in its pursuit of real justice, to look to matters which the party himself may improperly have overlooked; and if they are sufficiently substantiated and sufficiently strong, not to drive the party to the inconvenience of another proceeding. If, for instance, the master had a right to dismiss the mariners upon proper conditions, and with a due responsibility for the performance of such conditions, the want of consent on the part of mariners would not invalidate his act of authority if he possessed it. The only real question in this case is, did he possess such an authority?

Now, I confess it appears to me, that the circumstances in which this vessel was placed did  
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The *Estimote*.

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vest in him an authority to discharge his crew, upon proper conditions. Here was a ship that had encountered what the law might call a *semi-naufragium*—full of water, as they themselves state, so that they could not live on board. She is put into the hands of foreign carpenters for the course (a protracted course) of necessary repairs. It was doubtful whether she could at all receive such repairs as would restore her to a navigable state. It was by no means doubtful that she could not receive such repairs as would enable her to proceed till after the approach of spring in that climate had restored the seas to a navigable state, so as to allow her a passage. Is it clear law that the master, acting for his owners, could not, in such circumstances, dismiss the mariners on any terms whatever? If so, then he was bound to keep this crew in an unemployed state, living on shore, and keeping holiday all winter, at the expence of his owners, who were to continue all that time to pay, *pro opere et labore*, by virtue of the contract, though no work or labour could be performed; and thus the price of industry was to be regularly paid to unoccupied idleness! I know and feel the partiality which the maritime law entertains for this class of men, but it must not over-rule all consideration of justice to other classes, particularly to merchants, their employers; for what is oppressive to the merchant cannot but be injurious to the mariner. The seaman cannot be ultimately benefited by that which, as far as it operates, must operate to the discouragement of navigation.

It has been said that the master can have no  
right

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right to dissolve the contract, because the seaman cannot; and one party cannot be bound and the other loose — this mutuality is not a quality adhering to this species of contract throughout — not even in its commencement. A mariner signs a contract for a particular voyage; he cannot decline to go; he is exposed to heavy penalties if he does. But how is the master bound for the owners? He may change his mind at any time before he quits port; he may vary the voyage, the seamen cannot compel him to proceed upon it; all he can require is to be paid for the time he has served the ship in port, if he does not choose to accompany her on her new destination. Here the contract is nearly unilateral, binding one party to the voyage and not binding the other. The law allows, and justly allows, a greater discretion to the one party than to the other, for the one stipulates for his own labour — the other not only for the labour, but for the beneficial employment of valuable property confided to him by his owners, and subject to their direction. That the master can so vary is notorious. The ship here had proceeded on the original voyage, under the expectation, entertained on both sides, that she would return in the ordinary course of such a voyage. A total loss by wreck happens. This operates a total loss of wages. There may be cases of misfortune much short of this *semi-naufragium*, which were not occasioned by default of either party; but where it has arisen from the *vis major*, the act of God, which neither party had in contemplation at the time of the contract, it seems hardly just that the whole of the inconvenience

Abbot on Shipping, p. 4. c. 2;  
2 Raymond,  
Wells v. Osmond.

venience should fall upon one party, whilst a new and unexpected benefit is to arise from this common calamity — the benefit of living in ease and safety on shore at the expence of the other. This can hardly be the true rule applicable to such a case, under all possible circumstances, that the seaman can insist upon staying with the ship, be the prospect of its return ever so distant, and the most just terms offered for a return to his country.

I have looked with some anxiety to find, if possible, a decided case, or a rule of authority that could be applied to the discretionary powers of a master in such circumstances; but I have found none, either in the books of foreign jurists or in reports of decided cases at common law, or in MSS. cases. The cases where the rule has been provided for, are those where the seaman has been wrongfully discharged, or as the *French* express it, *sans cause valable*, upon idle or false pretences. There he has in most countries a right to charge up to the time of the return of the vessel to her original port. Such is the rule of the civil law, though this has been varied and modified in the rules of many countries. I observe its propriety to be doubted in the *American Reports*, where a very able judge has stated objections of weight in strong terms. These, however, are cases where there was clearly no *cause valable*, where there was tyranny, passion, and injustice on the part of the master, that warranted a penal retribution against him or his owners. But here is a case arising from mere misfortune, and approaching to almost a necessity. The rule to be applied must

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Loccenius,  
Emerigon, &c.

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not be founded upon any idea of penal retribution, but upon just ideas of a fair protection to be given to the seaman, under the casual and common misfortune that has occurred. See what his real damage and loss has been; compensate that, and then real justice and all honest policy is satisfied.

Take the ship when it came, in this shattered condition, into the Isle of *Gothland*. Suppose there happened to be at that time a ship bound to the port of *London*, ready to depart, but wanting a crew, that this ship accepted this crew and upon the same terms, and that the ship so navigated comes to *England* in the ordinary course of such a voyage, what damage can be assigned by the mariners in such a case? They return to their own country at the same wages and in the same time which they contemplated in their contract. It is a mere change of *vehicle*, not of *interest*. Surely no Court would uphold them in their claim to stay by their own unfortunate ship, and to make a profit out of the misfortunes of their owners, if their owners were willing to discharge them. In this case there was certainly no such ship offered; but supposing them to be carried at the expence of their owners to a port where a ship offered to convey them to their country, not as crew, but as passengers, what is their just claim? Certainly in the first place to have their passage paid — that is out of all question — and, if their wages are likewise paid by their owners up to the time at which they are landed in their own country, how are they damaged? They have all that they could have under their first contract; they are set down where they were taken up in their own country;

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country, and with the same money in their pockets, and open for fresh employment. I am therefore clearly of opinion that they have no right to charge, as they have done in this case, for wages up to the return of the *Elizabeth*. If they had staid by the *Elizabeth* obstinately, I think they would have done wrong, with respect both to their owners and themselves; I think the master had a right to discharge them under such circumstances of extreme pressure. They did right by acting upon this discharge, and if they are paid their passage and their wages up to the time of their return, they have all they can demand against their innocent owners. In this I go quite as far as the partiality of the law for this class of men will carry me; to go further would be to gratify an unwarrantable pretension. This is the rule which I am disposed to extract, from considerations of private equity and public policy, in a case not provided for by any existing regulation, either in the ordinances or decisions of this country, or in the books of authority given to the world by ancient jurists. Nothing can be more generally or more peremptorily laid down than that a master discharging a seaman wrongfully is answerable for the whole wages of the voyage of that ship; but can such a rule apply either in its terms or meaning to a case where, in consequence of an uncontrollable misfortune, for which no person was at all to blame, but which affects all parties, and on a grave and imperious necessity arising thereon, a crew is discharged in order to exonerate the owners from a most oppressive burthen; care being at the same time taken that the seamen shall be protected from all inju-

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rious loss? Is it to be laid down, that in no such case the master possesses no such responsible discretion, and that he is bound to let that crew derive a most unjust profit from the misfortune of their employers? I conceive not. He is not certainly, in their discharge, to act hastily or with precipitate fear. He is not to discharge but where the circumstances will make it *a cause valable*, a real and sufficient ground for such a procedure, still less is he to turn them adrift, penniless and without resource, in a foreign country. He is to provide them with a return home, and if he is answerable for wages up to the time of their own arrival at home, they can have no right to complain; nor can his owners have a right to complain of an improvident bargain on his part, because they are exonerated from a much heavier expence, from the demurrage of all these men, who may still be considered as acting in the service of the ship, by thus contributing to lighten its burthens. On the other hand, the owners have tendered what falls short of the measure which the Court considers as the measure of justice; for it does not contain even the passage expences, which must fall upon the owners; for they cannot discharge their crews in a foreign country on other terms than sending them home, and paying their wages up to the time of their actual arrival. I therefore pronounce the tender to be insufficient, and that the seaman is, under the special circumstances of this case, entitled to wages from the time of his entry on board this ship until his return to *England*, together with his costs.

## DOLORES, CARBONNELL.

**T**HIS ship, with a number of slaves on board, was captured on the 4th of *April* 1816, after a short action, by his Majesty's sloop of war *Ferret*, *James Stirling* esquire, commander, and carried to *Sierra Leone*; where the ship itself, and about 250 *African* slaves, men, women, and children, were condemned on the 18th day of *May* following, as *English* and *American* property, and as good and lawful forfeiture.

Dec. 10th, 1819.

Flag officer entitled to share of bounty given for seizure of slaves.

The *Ferret* was one of the squadron which, under the orders of Rear Admiral Sir *George Cockburn*, conducted *Bonaparte* to *St. Helena*, and she remained under his orders until her return from that island, when the admiral, on 27th of *March* 1816, gave Captain *Stirling* an order "to proceed to *Spithead*, and on his arrival to acquaint the secretary of the Admiralty therewith, and to transmit to him the accompanying dispatch."

The *Ferret* was on her way to *Spithead*, in pursuance of this order, when she captured this vessel; but Captain *Stirling* had no directions from the admiral to capture such vessels, and the *Ferret* had passed the limits of the admiral's station before the capture was effected.

Admiral *Cockburn* claimed the flag share of the proceeds of the ship and stores, and also of the bounty

The Dolores. bounty money, which was opposed by Captain  
 Dec. 10th, 1819. *Stirling.*

### JUDGMENT.

Sir *W. Scott.* — In this case I am called upon to pronounce upon the disputed claim of the flag share of Sir *G. Cockburn*, in the estimated value of slaves taken by the *Ferret* sloop of war, which sailed under his orders to *England* from *St. Helena*, and made the seizure in the course of that voyage. There can be no doubt that Sir *G. Cockburn* would be so entitled, if this was prize of war, and not a seizure; because the proclamation for distribution of prizes would have given it under the established construction which it has received. By that construction the flag officer is entitled to the benefit of a flag share, in all captures made during the prosecution of a voyage which he had directed, and which, at the time of the capture, continued without having been superseded by any other authority. It was not necessary, for the support of his interest, that he should have directed either this capture or any other; for in intendment of law he was concluded to be directing every thing that lawfully took place in the prosecution of the voyage he had so directed. It was not necessary that the capture should have been made within the limits of any particular station that had been assigned to him; for his authority travelled along with the vessel during her whole voyage, unless overruled by some controlling authority. In prize, therefore, the claim would have been indisputable under the proclamation, (for the authorised construction of the proclamation is the proclamation



clamation itself, whatever be its letter). He must have taken his flag share. The question now is, whether the same rule applies to *seizure*? This subject may have rules of its own; for the whole matter in both depends upon the judgment and will of those who established the rules. They may direct the same rules, or they may see differences which ought to introduce variations, or indeed total departures, from what had been prescribed upon the other subject. Looking at the subject with a private eye, one hardly discovers in the two subjects any such radical difference as ought to have led to the establishment of a different rule respecting them. If one great foundation of the interest so given in prize, is that it may act as a stimulus to superior officers, to send the ships under their command to places where they are most likely to make captures, the same stimulus is given by the same interest assigned to them in a matter of seizure. The rule, if it exists in both cases, has much outgrown any such consideration; for it is to be applied where no such prospect is held out—where the voyage was determined for reasons totally independent of any such motives—and where the capture or the seizure was a matter of the merest and most unexpected casualty. But the rule is founded (so far as it looks to motives and encouragement) upon general views of policy applicable to seizure in general, without attending to the disqualification of particular cases, where those circumstances which constitute the general policy do not happen to occur.

The particular case was a seizure of slaves, condemned

The Daphne

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demned under the abolition act. It is well known that the act, instead of giving the slaves to the seizors, gives them to the Crown; the Crown giving the captors a certain stated value, commonly called (perhaps not quite correctly) a bounty. It is in this bounty (which represents the property seized) that the flag share is claimed. It could not be in the power of the Courts to give this share claimed, unless specifically given by superior authority. It could not be borrowed from mere judicial authority, for prize and seizure are certainly not the same thing. It must be expressly given, or it cannot be taken; and it must be taken exactly as it is given, for it is all the creature of gift, which the Courts have no authority either to enlarge or to contract.

47 G. 3. c. 36.

The statute enacts, that in seizures of *African* slaves, such sums shall be given by his Majesty to the seizors, subject, nevertheless, to such distribution as his Majesty shall think fit to order and direct by any order in council. On the 16th *March* 1808, an order did issue, directing that the division and distribution shall be in the same manner, and form, and proportion, as by the proclamation now issued and in force is directed and appointed. The proclamation then in force was that of the 11th *November* 1807. This directs the flag eighth shall be paid to the flag officer actually on board, *directing* or *assisting* in the capture, *i. e.* who is on board his own ship, and gives the orders under which the capturing ship was sailing at the time of the capture. These are the public authorities by which this question is to be decided.

Now it appears, that words cannot be more  
stringent

stringent and definite than the words here employed, to direct an exact conformity and measure in these seizures to the interest given in prize. It must be the *division* and *distribution*, not the distribution only; but all parties entitled to divide in the one case shall be entitled to be included in the division in the other. The division and distribution are to be not only in the *same proportions*, but in the *same manner* and in the *same form*. Surely if an interpretation excluded any person who would be entitled under the proclamation for prize, it would be no longer the same division or the same proportions, nor in the same manner, nor in the same form. It would be a wholesale departure from the clear letter and evident intention that are to govern the transaction. If the course directed appeared to be such, that a much more convenient one might have been furnished, this Court, if it even had the presumption to entertain such an opinion, would have no authority whatever to act upon it; it must conform to the rule as framed. When that rule declares that the division and distribution shall be conformable to that of prize, it can establish no distinctive exclusion of any individual whom that rule includes.

If the Court saw any reason, arising either from the contents of the order of council itself, or from other authentic declarations relating to the same subject, to conclude that there was a substantial question existing with respect to the admission of the flag officer's interest, the Court might be tempted to give it further consideration. But I think that all appearances, both of the order itself, and

The Decree.  
Dec. 10th, 1812.

The Doctors.

Dec. 10th, 1819.

and of other solemn declarations proceeding from the same authority, lead to a contrary conclusion. I cannot but think, upon viewing the words of the order itself; that if any such exclusion had been meditated in the minds of those who framed the order, it is quite impossible but that, after the words which have been used in a manner so definite and yet so comprehensive, some explicit and determinate words of limitation and exception should have been added. It never could have been left on a footing, so largely and at the same time so definitely expressed, without some intimation expressly conveyed of an intended exception, if any such exception there was. The omission so made proves the absence of any such intention. With respect to other authentic documents, if this had appeared, that the Crown had on similar occasions, applying to the same subject, excluded the flag officer, it would have furnished a fair ground for an argument of analogy, that he was not to intrude himself here, in interests of seizure. But the fact is directly the reverse; without looking further into the statute book or orders in council, here in this very act on petition are two orders in council quoted, in which the flag officer's interest in seizures is expressly recognised; long anterior to the present transaction, on the 12th of *October* 1764, an order issued, in which the interest of flag officers is directly recognised and established; and another, subsequent to this capture, dated on the 14th of *October* 1816, in which a similar attention is paid to the interests of that officer. It is, therefore, not to be asserted that the Crown is either a stranger to his merits, or

or unfavourably disposed towards them in matters of seizure, and that he is to be excluded wherever he is not expressly introduced. He is here introduced by a direct reference to an authority which expressly designates him, and no ground of exclusion is shewn. I shall therefore pronounce, that *Sir George Cockburn* is entitled to a distributive share of an eighth part of the bounty or consideration money given for the slaves; and I direct the expences on both sides to be paid out of this money before the distribution takes place.

The Doctant.

Dec. 10th, 1819.

## FRANCES of LEITH, SYME.

April 1st, 1820.

The Court will not interfere to give possession of a ship's register to a person whose title to be considered as registered owner is subject to doubt.

**T**HIS ship was arrested in *November* 1819, in a cause of possession, civil and maritime, at the instance of *Walter Ferguson Syme* of *Leith*, and *Anthony Ferguson* otherwise *Syme* widow, of the same place, alleging themselves to be the owners of three fourth parts or shares thereof. The usual defaults having been granted, the Judge, on the 7th of *December*, decreed possession of the ship to them, as having the majority of interests; and on the same day, at their petition, also decreed a monition against *John Pirie* of *London*, merchant, to deliver up the ship's register. On the 22d of *February* 1820, Mr. *Pirie* brought in the certificate of registry, but objected to its being delivered out to the parties. An act on petition was entered into, supported by affidavits and documents, the substance of which is stated in the judgment of the Court.

## JUDGMENT.

Sir *W. Scott*. — This cause commenced by a warrant taken out at the instance of the two *Symes's*, mother and son, as owners of three fourths of this ship, in a cause of possession, civil and maritime; and it has been argued, that this must have been done in ill faith, for the purpose of concealing the real nature of the

the

the suit from the party against whom it was brought, and likewise from the Court itself, which, it is said, would not have entertained it if brought in a direct form. It is asserted to have had the effect of blinding the adverse party, who knew nothing of the existence of this suit till a considerable time after its institution, when its real nature was disclosed in its progress by a personal notice. It does not appear to me that this charge of fraud is well founded, — for though the suit certainly takes its rise, as a suit of possession in a case where the party seeking possession was already in possession as actual master, yet the real object of it was sufficiently proclaimed by the affidavit on which the warrant issued, which describes the party as master in possession, demanding only the restitution of the register. Neither do I see why the object might not have been more directly sought, by an original proceeding of a monition, to obtain the certificate of registry. It is very true, that the late statutes do empower justices of the peace to compel the delivery of such an instrument, only in cases differing from the present. But these statutes have nothing to do with the Admiralty jurisdiction upon these matters. If the Admiralty had no jurisdiction but what it derives from these statutes, it has no jurisdiction at all upon such subjects; for they do not at all refer to the jurisdiction of that Court — they merely give new powers in particular cases to justices of peace. The jurisdiction of the Admiralty (if it exists) is of an older date, and of larger extent. We know that it is not uncommon for parties, after applications to the justices without effect, to resort to this

The FRANCHISE.

April 1st, 1880.

28 G. S. c. 34.

34 G. S. c. 68.

The FRANCES.

April 1st, 1820.

No. 1, annexed to Mr. *Pirie's* affidavit, which exhibit is a letter addressed to him by *Bell* and *Sword*, that a cousin of theirs, a Mr. *John Bonar*, was the owner of half their share in this ship. It has been said, that this may be and is all very incorrect, but that it has nothing to do with the present conflict between the parties. That is not exactly the view of the case which I think I am bound to take; because if the course of the transaction, respecting this register, has been so incorrect as to affect its validity, or to render it at all questionable, it is a consideration which ought to affect the discretion of the Court in disposing of it. The Court is called upon to act upon a register; and if the history of that register discloses facts that *may* vitiate it in that character, the Court would certainly decline all interference in favour of a man, whose title to be considered as a registered owner is subject to doubt. It is only in clear cases that the Court would interfere — where the instrument itself, as well as the proportional shares of the parties, are free from objections; but if both are subject to objections, the Court would not lend its authority, where it may all be employed upon matters so involved in error, as to approach to the nature of absolute nullities.

The ship, however owned, is employed for some time under the management of this Mr. *W. Ferguson Syme*; and it cannot be denied, that it appears from the letters exhibited, that his management was not to the satisfaction of his partners. I do not enter into the matter or justice of their complaints, which are expressed with sufficient force in



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in various portions of their correspondence, and are at length ripened into a determination to withdraw themselves from the connection with him. But they propose to act upon a joint understanding, that they, Mr. *Pirie* on one side and Messrs. *Bell* and *Sword* on the other, wherever they were, were to withdraw in conjunction, not separately — because that must give the majority of interests to Mr. *Ferguson Syme*, or his mother, whom I must consider, on all reasonable presumptions, as identified with himself in the whole of this business. It sufficiently appears, that Mr. *Ferguson Syme* was desirous of obtaining one of the two fourths outstanding, as belonging to Mr. *Pirie* and to Mr. *Campbell*, in order to obtain that majority. But they had otherwise determined. They had stipulated with each other not to sell separately, but if that one consented to sell, the other, if consentient, should be entitled to the benefit of a similar engagement, if he chose to accept it; the shares being perfectly equal, and in all respects entitled, if transferred, to the same estimation of value.

It clearly appears, that Mr. *Ferguson Syme* was very much disposed to buy one of these one fourth shares, without buying the other. Such proposal appears to have been made by his agent, without disguise and without effect. The parties considered themselves as bound, by an honourable engagement, not to accede to it. The way of carrying this engagement into effect appears to be by a proposal, on the part of Messrs. *Bell* and *Sword*, to sell their one fourth on certain terms; but on the express condition, that a proposal to purchase on the same terms, made on the part of the

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*Syme's*, should be offered to Mr. *Pirie*. A proposal was made to *Pirie*, but was not acceded to by him; and it is no trivial part of the present question, whether the proposal so modified, was *really* and *substantially* the same which *Bell* and *Sword* had accepted. For if not, then no question that the acceptance by Messrs. *Bell* and *Sword* was absolute. *Syme* had done all that was required. Mr. *Pirie* had been left to his own liberty; if he chose to reject the same proposal which they had accepted, it left them at liberty to close their bargain, and Mr. *Syme* empowered to enforce it against them, if he thought fit. Messrs. *Bell* and *Sword*, or I should more truly say, Mr. *Campbell*, agent for *Bell* and *Sword*, executes a bill of sale (perhaps a little improvidently,) upon the perfect understanding that the same proposal which he had accepted on the behalf of his parties would be made and accepted by Mr. *Pirie*. This act of *Campbell* was ratified by the transmission of bills to the value required, and which have been since paid, according to value, to *Bell* and *Sword*, now in possession of the money, but willing to restore it upon any thing that can be considered as a rescinding of the contract. The question remains, whether the proposal rejected by Mr. *Pirie* was the same which the other parties (meaning to act in conjunction with Mr. *Pirie*) had (perhaps rather hastily) accepted.

The proposal offered to *Bell* and *Sword* by *Syme* was the purchase of the one fourth upon 180% less than the original costs. Nothing is said here about outstanding debts due from the ship and the manager,

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nager, Mr. *Ferguson Syme*. How am I to understand this? Certainly when the matter is proposed to Mr. *Pirie* he accepts the proposition, upon the express condition only, that he should not stand liable for the outstanding debts of the ship. Is this acceptance of his, so limited, the same acceptance as that of Messrs. *Bell* and *Sword*? If not, he left the other parties at entire liberty, and his refusal did not prevent them from making their bargain fully effectual; for they had stipulated only for his having the same bargain offered to his acceptance, and if he added new and important conditions, it was not the same. He must be understood to have rejected that proposal, which they had been content to accept.

Now upon this question of fact, and the understanding of the parties about it, I find great difficulty in ascertaining the truth from the evidence that is offered, which consists principally, almost entirely, in correspondence. I have already observed, that in the contract accepted by *Bell* and *Sword*, nothing at all is expressed about an indemnity from the outstanding debts, though natural that it should. Was it, however, so understood? If it was a part of the contract left to the mere understanding of the parties, it was a part very unfit to be so left. How stands it upon the evidence? In one letter it seems that they agreed to pay their share of the outstanding debts.—In the letter, No. 7, annexed to the affidavit of Mrs. *Syme*, *Bell* says, “I hereby bind and oblige myself to  
 “ repay you whatever sum, upon an investiga-  
 “ tion of the accounts, it may be found that you  
 “ have overpaid; and I hereby agree to leave the  
 “ adjustment

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“ adjustment of them to Mr. *William Smith*, as  
 “ sole arbiter, and this in reference to our agree-  
 “ ment for the sale of the said share.” Again,  
 in various passages, they represent Mr. *Pirie* as  
 having introduced this indemnity as an entire  
 variation from their contract. In the letter, No. 5,  
 annexed to *Pirie*’s affidavit, they write, “ We fear  
 “ they mean to take advantage of you not having  
 “ accepted direct to the offer.” So in the letter,  
 No. 5, annexed to the same affidavit, “ We ex-  
 “ pressed our fear, however, to you, that you had  
 “ not accepted the offer exactly in the terms of  
 “ it.” Again, in the letter, No. 8, they say, “ The  
 “ unfortunate part of the business was, your not  
 “ at once accepting the offer as made.” In all  
 these letters there is a direct admission, that they  
 had not insisted on such an engagement; yet  
 there are passages that have a contrary aspect. In  
 the letter from *Bell and Sword* to *Smith*, who was  
 the agent for *Syme*, a copy of which letter was  
 sent to *Pirie*, inclosed in that which is marked  
 No. 6, they say, “ Of course you will give indem-  
 “ nification against ship’s debts which we wrote  
 “ you for — say letter of relief from all debts due  
 “ on the ship; and unless we receive this, in fact  
 “ you would be getting the shares for nothing.”  
 Again, at the close of the letter, No. 8, addressed  
 to *Pirie*, they say, “ We have troubled you at  
 “ this length, to put you on your guard against  
 “ accepting any other offer, that does not for its  
 “ basis warrant you free of all the outstanding  
 “ debts, which we suppose will be near 300l.”  
 From all these expressions one would be led to  
 suppose that they must have looked to the same  
 sort

sort of protection for themselves. The shares were equal; the purchase money would be the same; and of course it must be supposed that they had provided some way or other for the like indemnity to themselves. There is an inconsistency in these letters which I am not quite able to clear away.

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The offer is made to *Pirie*; he expressly insists upon an indemnity. The offer is retracted; but then, strange to tell, not upon the ground of that demand at all, as far as appears, but on the ground of *circumstances that had occurred, which had changed the mother's mind*. The letter of *Smith*, the agent of *Mrs. Syme*, to *Bell and Sword*, is in these terms: "With reference to my letter of the 4th instant, I am instructed by *Mrs. Syme* to say, that circumstances have occurred which have induced her to decline purchasing Mr. *Pirie's* fourth share of the *Frances* at the sum mentioned." It was hardly possible that the thing should have been so expressed, if the offer had been retracted on the mere demand of indemnity. It must have been said at once, "We made the offer, but Mr. *Pirie* has rejected it as proffered; therefore we are free." It is impossible that they should have wrapped it up in a reference to mere unexplained circumstances.

A letter of *Bell and Sword* immediately follows, which I find great difficulty in understanding. In this letter, which is dated *November 8th*, and addressed to *Smith*, they thus express themselves; "We have yours of the 6th instant, which surprises us not a little; the sum mentioned was 100*l.* less than Mr. *Pirie* had paid, and con-

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“sequently agreeably to the offer made by:  
 “Mrs. *Syme*; but that Mrs. *Syme* may have no  
 “opportunity of taking advantage of Mr. *Pirie*’s.  
 “non-acceptance of her offer, we hereby for him  
 “accept of her offer to him of the fourth share of  
 “the *Frances*, in terms thereof.” What authority they had for this I am at a loss to know, nor can I suggest any reasonable explanation of the contents of this letter.

In this course of involved transactions and details I find it very difficult to pronounce upon the interests of the parties; and amongst other interests, that of *Syme* on the purchase of *Bell* and *Sword*’s share, which, if substantiated, would give him the right to the certificate of registry. Here is the money actually paid, though the parties profess themselves ready to return it; here is an order for sale of a part of this vessel, but executed by a person who has not a particle of interest in the vessel; here is a contract of sale, the efficacy of which was to depend upon the efficacy of a sale to be subsequently offered to another party, which has not taken effect, but which it is averred the party has a legal power to enforce, according to the law of that part of the kingdom to which the vessel belongs. Is this a case then so clear in its circumstances as to authorize the Court to proceed to the strong measure of changing the possession of what is called the register? I confess I think that not only the confused state of the private interests here, but likewise important questions of public policy, forbid me so to consider it. Cases have been quoted of decisions on various interests—

terests — legal interests, equitable interests, inchoate interests, and vested interests under the navigation laws. I am not prepared, by the only evidence offered, (that of these letters,) to say to which class of interests the asserted interests here are to be referred, or what their actual state legally is. It is certain, that the later decisions of the Courts, attending to the necessities of commerce, have mollified the rigour of some constructions of this class of statutes that were adopted in the earlier cases, and amongst others, particularly in that leading case of *Moss and Charnock*. But I am not aware that any decision has recognised the validity of a transfer to a mere agent or trustee, the name of the real owner of the part so transferred being entirely concealed. The general rule I take to be, that the register and certificate are conclusive evidence of want of title against those not named therein: what the practice of the custom-houses upon the point is, I have endeavoured, but without success, to learn from the custom-houses both of *England* and *Scotland*. It may be, for any thing that I know to the contrary, that the necessities of commerce may have induced a practical relaxation even to that extent. But, under an ignorance of any such existing practice, and looking to the literal tenor, and likewise the fundamental policy of these statutes, I cannot presume it. Neither can I, upon the jarring representations given in these letters, take upon me to pronounce what sort of interests these involved transactions have given to the respective parties. That must be the subject of a more direct and stringent inquiry, applied to a formal investigation

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investigation by a proper court, and ought not, and cannot be decided here, upon a mere bye question of the possession of the register.

What I shall do, therefore, in this case, will be to restore matters to the footing on which they were placed before the institution of this suit, by restoring the register to the hands that then held it. The parties must resort elsewhere for the investigation of their titles. But I shall not dismiss this cause at present; for I shall reserve the consideration of costs till the real justice of the case is determined by the competent jurisdiction, or till the parties themselves have come to some clear adjustment upon the subject of their litigated claims.



## WATERLOO, BIRCH.

**T**HIS was a cause instituted on behalf of *William Moffat* esquire, the owner, *William Adamson* the commander, and the rest of the officers and crew of the *East India* ship *Winchelsea*, against the ship *Waterloo* and her cargo, for services rendered to the *Waterloo* and her cargo, when in a situation of distress in the *Indian* seas. An appearance was given for "The United Company of Merchants trading to the *East Indies*," as the owners of the *Waterloo* and the principal part of her cargo; and it was contended on their behalf, that by the terms of the charterparty, and of the instructions under which the ships sailed, no salvage could be demanded for services rendered by one of these ships to the other, and that the *East India* Company were, by usage and practice, exempt from the liability to pay salvage.

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The *East India* Company are not exempt from the payment of salvage to a ship in their employ for services rendered to a ship belonging to them.

## JUDGMENT.

Sir *W. Scott*. — This is a demand of salvage made by the owner, officers, and crew of the ship *Winchelsea*, which was chartered to the *East India* Company, for services rendered to the ship *Waterloo* and her cargo. The suit commenced by an arrest of the ship, the cargo having been previously delivered. The ship and cargo are of great value, 275,000*l.*, and the *East India* Company have

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have appeared as the principal owners of both. They do not deny that services have been performed, which, in other cases, would be clearly and justly deemed salvage services, and entitled to remuneration as such. This being admitted, it is unnecessary in the present discussion to enter into any particular description of them; for the present discussion is altogether independent of their particular extent; the question turns upon a more general right, asserted on the part of the *East India* Company, of an entire exemption from the payment of salvage.

It would have been convenient if this claim of exemption had been more accurately defined, both in the act on petition and in the argument. It has been alleged and contended, that cases of salvage arise only where the ships belong to different persons, but that here they belong to the same persons; and if that were the fact, the absurdity would follow of the same person paying to himself. But the fact is directly the reverse, for the ship saved belongs to the *East India* Company, and the ship which performed the service to other individuals, who let her upon freight to the Company, and under a particular charter, but which charter, of course, leaves the property in the vessel exactly where it found it, and in all respects, where the engagements of the charterparty do not apply, as independent a property as that in any other vessel whatever. The commander, officers, and crew, are all appointed by the owner; they cannot be transferred to a Company's ship at the pleasure of the Company, as the King's officers and crew are, at the pleasure of the crown, to another of his Majesty's

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Majesty's ships; it is merely by the voluntary act or contract of the owner that the voyage is undertaken, for the Company had no other right so to employ her. All argument, therefore, that is built upon identity of interest totally fails. Again, it has been alleged that the Company is not subject to salvage in the case of ships generally employed in their service; but the argument has turned out very short of that extent, being confined to ships associated together, and sailing under particular instructions for mutual aid and protection. How far does usage extend upon this point? Is it universal, or is it restricted to the latter case? Certainly, where an exemption is claimed from a submission to a general rule, the exemption ought to be so set forth as to be intelligible in its extent. An indefinite claim of exemption is *rank*. It is not enough to say, that the immediate claim comes within the smallest extent. The Court must know what it is you claim; for the claim, when stated exactly as it is, may destroy itself *in toto*, and appear to have no rational foundation whatever. To what is it that your written documents are contended to apply? to what your usage? for upon these two foundations the claim of exemption rests, and the Court ought to be precisely informed what is the extent you assign to each of them.

This information is peculiarly necessary in a case where the exemption is claimed from a right otherwise universally allowed, and highly favoured in law, for the protection of those who are subjected to it; for it is for *their* benefit that it exists under that favour of the law. It is what the law calls *jus liquidissimum*, the clearest general right that they

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they who have saved lives and property at sea should be rewarded for such salutary exertions; and those who say that they are not bound to reward, ought to prove their exemption in very definite terms, and, by arguments of irresistible cogency.

The two grounds of exemption which have been relied upon are, first, *written documents*, viz. the charterparty and instructions; and secondly, the *usage*, which has been described in the argument as generally understood by all parties.

I have searched the documentary evidence with great attention, but have not been able to discover that salvage is in any way provided for or even named in those instruments, and I confess that I think the claim of being discharged from a liability to salvage is one which a Court would not be justified in admitting, unless the discharge appeared in express terms, and in a contract that, by the use of clear and explicit language, should remove all doubt respecting the common understanding of both parties. A clear and general right ought not to be ousted by questionable expressions and violent constructions. In these instruments, which are framed with minute attention to a great many subjects that are likely to occur, provision is made respecting freight, averages of different kinds, demurrages, employment in warfare, and several other possible occurrences. Salvage performed to others is certainly no where included in any of these provisions, and it is not distinctly mentioned by itself; nor is it within the competency of the Court to include it in any of them by any fair interpretation, and still less

can it insert it as a substantive part of the agreement. Some observations have been made upon the propriety and impropriety of inserting some such covenant in the future charterparties of the Company. Upon such topics I have no observation of my own to offer; they belong to those by whom the general interests of that great establishment are conducted. The only remark I shall venture to make is the very obvious one, that it is highly expedient that there should be a clear understanding of the contract upon this matter amongst all parties.

It has been said, however, that there is an acknowledged understanding to this effect, and that this understanding is sufficiently proved by the usage as well as by the instructions. As to the instructions, they appear to be very limited in their application; in the first place, they apply to associated ships only, and do not extend to other ships which are merely employed by the Company; but if they did, they extend no further than to enjoin the duty of assisting other ships belonging to the Company; but they do not express that this duty, which it is very proper to enjoin, shall receive no remuneration, whatever be the active merit, whatever be the suffering incurred in performing it. It is the duty of all ships to give succour to others in distress; none but a freebooter would withhold it; but *that* does not discharge from liability to payment where assistance is substantially given. The Company might possibly sustain their claim of exemption in cases of slight services rendered by ships in their employ; but it is quite another thing to sustain a sweeping claim of exemption

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emption in all cases whatever. But the usage is said to prove the existence of the understanding. I have already noticed that the usage is not described in any proper limitation of its extent. It cannot be said to apply universally to all other ships, for if so, an *East India* ship could never entitle itself to a salvage, which can hardly be admitted; and if their ships could be salvors against others, surely upon a common principle of mutuality other ships may be salvors against them. But if the nonpayment of salvage is to be restricted to ships in their employ, that restriction must be introduced by contract expressed or understood, for otherwise a Company's own ship would be entitled against the ships in their employ, and the ships in their employ would not be entitled against them reciprocally. In this particular case the facts might have been inverted, and the Company's ship have been the salvor of the other. But it is said, that the agreement has been so generally acted upon, that salvage has in no case been paid. How many cases may have occurred in which it was really due, and in which, being due, it was not paid or settled in some way of remuneration or other — how far the persons who let out their ships may have looked to other and larger interests to be expected from the patronage of that great body, in case they did not push their demand to the extent of litigation — I have no means of knowing. These are all considerations that leave the existence and effect of this universal negative usage in a state of infirmity. But here is a gentleman, the contractor, who swears most positively that

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that he had no such understanding of the contract, and that after forty years connection with the employment, he never heard any thing of such an understanding. This goes a long way to affect the usage in all views of it. It cannot be supposed that he was ignorant of that which all other persons, placed under the same circumstances as himself, fully understood. He could not have been for forty years an inattentive observer of similar contracts made by other persons employed in the same manner as himself. It could be no secret or novelty to him. If it was so universally understood by others. I cannot but think it a material defect on the part of the Company, that they have produced no such persons to prove *their* understanding of the matter. It would have gone a great way, indeed, to establish their interpretation of these instructions, if other contractors had come forward, and said that such had been always *their* interpretation of it. *That* would have proved the witness an uninformed man, who had been careless in his inquiries, and who might perhaps be bound by the common understanding of the contract, though he himself had not so understood it. Although it might, perhaps, still remain a question, whether he was bound by the tacit understanding of others in such contracts, when his own contract did not purport any such thing, and he himself had never meant so to contract.

The understanding here is proved only by the clerks of the freight-office to the Company. They are very respectable persons; but they only prove that no such claim of salvage has been made or allowed in the department to which they belong,  
as

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as it certainly would not upon any supposition. Such being my opinion of the case, I shall certainly overrule the argument in favour of exemption, and proceed to the consideration of this case as one of salvage. I am desirous to hear counsel on the merits of the case.

*Adams* and *Lushington* for the salvors, said it would be unnecessary for them to detain the Court at any great length in the observations they deemed it their duty to make. The amount of the property on board the *Waterloo*, and the value of that ship herself, amounting together to the sum of £275,000, would form a very important feature in the quantum of salvage which the Court should think proper to award. Neither was the value or bulk of the property transferred from the *Waterloo* to the *Winchelsea* to be left out of consideration. It composed a valuable part of the cargo, to the amount of £8,000, and was of very considerable tonnage. The merit of the service thus performed was much enhanced by the danger in which the property already on board the *Winchelsea* was subjected to by this bulky addition; and there seemed little reason to doubt, that if, as was very probable in those inhospitable regions, a storm had arisen, the whole of the property must have been sacrificed; the salvage, therefore, was performed with very great risk to the property of the salvors. They referred the Court to two letters written by Captain *Birch*, the commander of the *Waterloo*, which shewed his opinion of the services performed. In one of them, addressed to the commander of the *Winchelsea*, Captain *Birch*, in  
very



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very energetic terms, thanks him for the great services he has rendered him, and for the *promptness* with which Captain *Adamson* took the cargo on board his vessel; he could not express his thanks for such services, but he assured Captain *Adamson* they would ever be most gratefully remembered by him. In the other, which was written immediately on the arrival of the ship in the *Downs*, to Mr. *Moffat* the owner, Captain *Birch* thus expresses himself, after stating the nature of the services:

“ I express to you my sincere thanks for the  
 “ obligations I am under to Captain *Adamson*, for  
 “ the very prompt, cheerful, and material services  
 “ he has rendered, and I am fully sensible of the  
 “ inconvenience he was put to.” What language could be found better adapted to shew the merit of the services performed — prompt in offer, cheerful in performance, and material in effect? The Court would also consider, that, in the performance of this salvage service, the vessel itself had sustained serious injury: she was certainly enabled to complete her voyage; but, on examination here, it was found that her timbers were strained, and she was obliged to undergo some extensive repairs before she could again proceed to sea. They therefore hoped the Court would consider this a service of considerable merit, and assign a proportionate reward; and they could not help here remarking upon the conduct pursued by the *East India* Company; they were as much interested in the promoting salvage service as the committee of *Lloyd's*; and, instead of straining charterparties and raking up points of law, as they have done in this case, they would have

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exhibited much more wisdom in pursuing the example of the committee of *Lloyd's*, of giving some additional remuneration to that usually awarded, and thereby insuring future attention to their vessels when in danger.

*Swabey* and *Jenner*, on behalf of the *East India* Company, contended that the merits of this case had been much over-rated by the counsel in favour of the salvors. The Court would recollect that these ships were sailing in company, and under the same orders ; so that the performance of the service was a mere act of duty which they owed to their employers ; and, indeed, throughout the whole of the evidence, there did not appear any risk or danger of either life or property, and it certainly could not be considered as a case entitled to any extraordinary remuneration. The *East India* Company did not now mean to deny the right to salvage, and with respect to its amount they relied with confidence on the decision of the Court, to which they would bow with the most perfect respect.

#### JUDGMENT.

July 4th,  
1820.

Sir *W. Scott*. — I believe the only question reserved is the consideration of quantum. The property saved is very considerable in amount. It is the practice of this Court, when the property is of small amount, to award a larger proportion of the value of ship and cargo ; where the property is of greater value, the Court always conceives a less proportion is sufficient ; and where it is of vast extent, as in this case, a moderate proportion may reasonably be considered as a competent

tent reward. In this case, I am also bound to observe, that the ships were sailing together, in association, and under the same orders; and, also, that in the course of the voyage, the very ship salved rendered some efficient service to the persons now claiming salvage, when the vessel of the latter had got into distress. Combining all these circumstances, I allot the sum of £4,000; and in subdividing this, I decree one half to the owners, because their vessel ran considerable risk, by taking on board the valuable articles saved, many of which were of great weight; in consequence of which their ship was strained, and obliged to undergo repairs. Nor can I altogether lose sight of the danger which she thus incurred of vitiating her insurance, although that may be a questionable point.

I pronounce that the sum of £4,000 is due for salvage, and condemn the *East India Company* in that sum, and in the expences of the suit, and direct the distribution to be made as follows, viz.: £2,000 to be paid to *William Moffat* esquire, the owner of the ship *Winchelsea*; £500 to *William Adamson*, the commander; and the remaining £1,500 to be divided between the rest of the officers and crew, in the same manner as prize proceeds would have been distributable amongst them.

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1820.

£4,000  
Value  
2,750

GENOA and its Dependencies, SPEZZIA, SAVONA,  
and other towns.

July 19th, 1820.  
Greenwich  
Hospital is not  
entitled to a per-  
centage upon  
booty taken by  
a conjunct ex-  
pedition of sea  
and land forces.

THIS was a proceeding instituted on the part of the Commissioners, Governors, and Treasurer of *Greenwich* Hospital, against *Richard Birt*, a prize agent, for the purpose of trying the right of the Hospital to receive five pounds *per centum* on the proportion, due to the naval forces, of the proceeds of the booty taken upon the surrender of *Genoa* and its dependencies, on the 18th of *April* 1814, to a conjunct expedition of his Majesty's sea and land forces, under the command of Admiral Sir *Edward Pellew*, now Lord *Exmouth*, and General Lord *William Bentinck*. The usual proceedings were instituted in the Court of Admiralty, and on the 24th of *January* 1815, the property was condemned as good and lawful prize to his Majesty. On the 1st of *August* 1815, the Prince Regent, by warrant under his sign manual, granted the proceeds of the booty to Lord *Exmouth* and Lord *William Bentinck*, and appointed them trustees for the division and distribution thereof to the naval and military forces by which the capture was effected. A monition was, in the first place, taken out against Lord *Exmouth*, calling upon him to pay the amount of the percentage claimed by the Hospital, or to shew cause to the contrary; but in consequence of its having been discovered that a part of the proceeds were in

in the possession of Mr. *Birt*, who had received them for the purpose of distribution, the proceeding against Lord *Exmouth* was abandoned, and a similar monition was taken out against Mr. *Birt*. An appearance was given for Mr. *Birt*, and an act on petition entered into, in which the acts of parliament intended to be relied upon were set forth, *viz.* on the part of the Hospital, 46 G. 3. c. 100 and 101, 55 G. 3. c. 1, 57 G. 3. c. 127, and on the part of Mr. *Birt*, 45 G. 3. c. 72.

GENOA, &amp;c.

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## JUDGMENT.

Sir *W. Scott*. — This question arises upon a claim of per-centage made by the Governors of *Greenwich* Hospital, upon property taken at *Genoa*, in the month of *April* 1814, by a conjunct expedition of sea and land forces, under the command of Sir *Edward Pellew*, now Lord *Exmouth*, and Lord *William Bentinck*, which was condemned in this Court in the month of *January* 1815, as lawful prize. Various statutes are referred to as the sole foundation of this claim, and if it be not supported by these statutes it has no foundation whatever. The only appeal made by the claimants is to these statutes: they pretend to no other title, and the first, and indeed the only point for consideration therefore is, whether these statutes do, by fair interpretation, give the interest claimed. There is no occasion for entering into controversy about the interpretation of clauses in the general Prize Acts, or in any other acts whatever. Received interpretations of what are called the Prize Acts, being upon subjects of some affinity, may possibly aid the interpretation of these special acts;

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acts ; but I repeat, that the title to the percentage claimed for the Hospital must be shewn existing in these acts, (which are the acts of donation,) or it does not exist at all. Now I am of opinion, both upon reasoning and authority, that such title cannot be maintained upon any fair interpretation of these acts.

46 G. S. c. 100  
and 101.

57 G. S. c. 127.

55 G. S. c. 1.

Sect. 4.

The acts in number are three; the 46th of *George the Third*, c. 100, one in the same year, c. 101, and the 57th of *George the Third*, c. 127. There is indeed a fourth cited, but it does not bear upon the question before me, and I shall not, therefore, at present consider it. The first act in substance states, “ that all prize agents shall, from and after the passing of the act, pay to the Hospital 1*l*. 13*s*. 4*d*. per cent. upon the net proceeds of all prizes taken during the present war by any ship or vessel of war in his Majesty’s pay ;” and states to the same effect with respect to bounty bills. Here is not a word about land booty taken by the conjunct operation of army and navy, and I am, therefore, led to the consideration of the meaning of the word *prize*, as here applied. It evidently means maritime capture effected by maritime force only — ships and cargoes taken by ships. It is perfectly well known, that a land force has no interest in *prize properly so called* ; what a land force takes by itself is not *prize*, but *booty*. What is taken by a conjunct expedition was formerly erroneously considered as vested, in a certain proportion of it, in the capturing ships under those prize acts ; but in a great and important case lately decided, it was determined, that the whole was entirely out of the effect of these prize acts ; and in so deciding,

Hoogakarpel,  
Lords of Appeal,  
1785.

deciding, determined by direct and included consequence, that the words "prizes taken by any of his Majesty's ships or vessels of war," cannot apply to any other cases than those in which captures are made by ships only; and that if a land force is employed in it, the law does not recognize its title. That decision clearly included in itself an interpretation of those words, wherever they occur in any act of Parliament touching such matters. It is true that a later prize act did introduce and did provide for two cases of conjunct capture, preceded or accompanied by certain requisites of instructions from the Crown, or agreements of the two commanders confirmed by its authority, neither of which requisites occurs in the present case. Upon the clauses described (the clauses in the prize acts relative to this subject), some discussion was introduced into the act on petition, and more into the argument, which I do not feel necessary at all to examine, for the reason I have already intimated, that the solution of the present question does not depend upon the prize acts, but upon these per-centage statutes. So the controversy respecting the word *grant* in those acts, and whether the royal authority has been employed in this very case, in making a grant according to the meaning of the word in that prize act, or only giving an instruction for the distribution, appears to me to be rather at a distance from this question. For taking it in the sense most adverse to the captors, that it is a legal grant giving the interest in the strictest meaning of the word, still you must look to see what it is that the grant gives; and if the grant (be it a grant) does not give the interest

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45 G. 3. c. 72.  
s. 3, 4.

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contended for in property taken in conjunct expeditions, it signifies little what is its own character or description, so far as the present claim is concerned. All I will say upon these clauses is, that it is greatly to be desired that more precision may be given to the language of their provision than they appear at present to possess, whenever occasion calls for a revision of them; and in making this observation, I, perhaps, press harder upon myself than any other individual.

57 G. S. c. 127. If this claim exists with any foundation, it is to be found only in the third act, which certainly imports most material changes in the provisions made for the bequest of the Hospital. The original principle of this species of its endowment was, that those should contribute to it who took property under his Majesty's liberal grant of his interest, in prize, and who might be ultimately benefited by its establishment, by being in his Majesty's pay and on board his vessels. It is now enlarged, to include other persons in the duty of paying five per cent. who have no prospect of any such benefit, and who, on that account, might not perhaps so readily reconcile themselves to the imposition of such a tax. Speaking with all the respect due to an act of parliament, I cannot help expressing a wish that it had been framed with more technical accuracy, and had manifested a more familiar acquaintance with some of its subjects than appears upon the first perusal of it, and by so doing, had carried with it a more distinct and intelligible, and indeed a more practicable meaning.

With respect to the second and third acts recited in the act on petition, I observe, that not  
one



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one word is said about conjunct expeditions, and, indeed, that the acts do not appear to contemplate them. It seems to be supposed that prize agents had the management of these concerns; now the act relates not only to prize, but to colonial, commercial, and slave abolition transactions, with which prize agents had nothing to do, and did not possess the power of enforcing. These matters seem to require a reconsideration of the act, for they never could have been intended to be construed in the same universality in which they are expressed. It cannot be supposed that any grant that comes into the hands of prize agents, let its nature be what it may, let it relate to what subject it will, must pay this per-centage. They must receive a limitation, and the fair and proper limitation appears to me to be to grants made to the Royal Navy or Marines, with which the prize agents, as such, have to do. The fact is, that this act did not contemplate and has not included the case of conjunct expeditions and divided interests. It looked only to grants of entire interests on which the whole net proceeds could be taken. It cannot otherwise be executed in a manner consistent with its own provisions. If it be intended to apply to shares and proportions of prize grants, it must be otherwise expressed, for as now expressed, it is impracticable in its application.

The result is, if fairly deduced, that these statutes do not include property taken in a conjunct expedition. They refer to maritime acquisitions only of different kinds, but not where an interest of a totally different kind is associated, which

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which entirely alters the legal nature of the property. In the answer on the part of the captors, I observe it is said, that the act gave no percentage upon booty taken before the passing of that act; if I am right in my interpretation of booty, it gives no per-centage upon booty whenever taken. It is upon prize only and upon grants of that nature, where no land force intervenes to introduce at all the character of booty.

I throw into the scale of these considerations one which appears to me to be of no small importance, that any other construction than that which I am inclined to adopt, imports into the subject a great inequality between the proportions assigned to the two services. From the proportion assigned to the naval force calculated upon a just ratio of relative numbers, a five per cent. is to be deducted, whilst no such drawback is applied to that share which is assigned to the military force acting with the same zeal and upon the same occasion.

When I add to this, that this is a demand *primæ impressionis*, that no such demand has been made by that great establishment, vigilant and attentive as it is known to be to its just interests, I express my opinion to be decided, and that this claim is not established.

## PRINS FREDERIK, VAN SENDEN Commander.

THIS was the case of a ship of war, armed *en flute*, belonging to his Majesty the King of the *Netherlands*, which, in the prosecution of her voyage from *Batavia* to the *Texel*, with a valuable cargo of spices and other goods on board, suffered considerable damage off the *Scilly Islands*, and was brought into *Mount's Bay* by the assistance of the master and crew of the *British* brig *Howe*, belonging to the port of *Penzance*, and was afterwards removed to *Plsmouth*. A warrant of arrest of the ship and cargo, at the instance of the salvors, was extracted and executed; but the person who was left in possession, under the authority of the Court, was shortly afterwards dispossessed, by Captain *Van Senden*, and compelled to quit the ship. On the 4th of *November* 1819, an attachment was moved for against Captain *Van Senden*, when the judge directed the matter to stand over, but said he should expect that an appearance should be immediately given for the captain, or an assurance from the ambassador or consul of the *Netherlands*, that the ship should not be removed from *Plsmouth*. An appearance was, on the 7th of *December*, given for Captain *Van Senden*,—but under protest to the jurisdiction of the Court. An act was entered into, and affidavits exhibited on the part of Captain

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Question whether a foreign ship of war lying in a port of this country is liable to the civil process of the Court of Admiralty in a cause of salvage at the suit of British subjects.

*Van*

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*Van Senden*, and of the salvors; and on the 2d of *May* 1820 the cause came on for hearing.

For Captain *Van Senden*—the *King's Advocate*. This is a question of very considerable importance and delicacy, in which the Court will have to decide between the claims of individuals asserting an interest of salvage in this ship, under the circumstances which have been before stated, and the claims and privileges of a sovereign power asserting this to be a vessel of war appropriated to the service of the state, sailing under the commission of the sovereign, and as such, exempted from the civil process of this nature. I shall assume for the present, and for the sake of the argument, that the character and description of the vessel coincides with that ascribed to her, meaning, undoubtedly, to advert, in the sequel of my argument, to those grounds in the act on petition, upon which it is attempted to deny that the vessel is entitled to be considered as a ship of war, since the act alleges, that this vessel is not to be considered as a ship of war; and, secondly, that if she were so, she is not entitled to the exemption which is claimed for her. It may be more convenient, however, to take the question of law first, and then to shew that the facts are such as fairly support the principle of law for which we contend.

The law, which the Court will have to apply to this case is not founded on any positive statute or custom of our own country, but must be extracted, by the wisdom and discretion of the Court, from the general principles of the law of nations, which are so broad and comprehensive as to carry with them their own qualifications suited to the nature

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nature of the subject to which they ought to be applied. This is the authority on which this Court proceeds to entertain questions of salvage on foreign ships. I am not aware of any case in which the jurisdiction of the Court on foreign ships has been the subject of much adverse discussion. But I collect from what fell from the Court in one case, that it would not absolutely refuse to hold jurisdiction in cases of that description. It there observed, " Salvage is " a question of the *jus gentium*, and materially " different from a mariner's contract, which is " a creature of the particular institutions of " each country, to be applied and construed " and explained by its own particular rules. " There might be good reason, therefore, why " this Court should decline to interfere in such " cases, and should remit them to their own " domestic forum ; but this is a claim upon the " general ground of *quantum meruit*, to be governed " by a sound discretion, acting on general principles ; and *I can see no reason why one country " should be afraid to trust to the equity of the " Courts of another, on a question of such a nature " so to be determined.*" In that case there were, among the crew, some persons who stood in the double relation of *British* and *American* seamen, and the Court finally considered them as *British*, and on that ground treated it as a prize case of rescue from the enemy, and decided upon it finally in that view, and not upon any question of jurisdiction. Supposing that under reasonable limitations the Court would exercise a jurisdiction in cases of salvage of foreign ships, yet, under the description which the Court gives of its own jurisdiction, I presume

1 Robinson, 279.

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presume that it would not exercise it otherwise than on the broad principles of the law of nations — on which it presumes that other nations would be disposed to concede it, and which are so general as to embrace all interests, and will be to be applied therefore to this case, with special reference to the particular circumstances on which the claim to exemption, on the ordinary process of the Court, is founded.

I will now advert to the facts of the case, so far only as to observe, that it is not a case of derelict, in which there might be a total obliteration of the original character of the vessel, and in which there might, therefore, be a necessity for some judicial inquiry to ascertain the title of any persons claiming an interest in her. This is not a case of that kind of total abandonment, in which a vessel being saved by the exertions of individuals has been brought in by them and delivered to the care and protection of the Court. This vessel came first upon the coast, where, being in some distress from bad weather, which she had encountered, and desirous of going into *Portsmouth*, she took on board two persons as pilots, from a merchant vessel, and then went into a port in *Cornwall*, from whence she sailed again in a free character, and went into *Plymouth*, where the civil process of the Court was exercised upon her, to obtain a salvage for the services of these two persons.

This is the general description of the case ; and it will be found, I humbly conceive, that the principle on which the parties come to this Court to obtain a reward for their services in the nature of salvage, if such service should appear to have been rendered,

rendered, is applicable only to merchant ships, and not to ships of this description. Suits for salvage in the Admiralty Court are proceedings altogether *in rem*. It has been said that salvors have a lien on the property; I admit the description of the general interest of salvors; the Court has so held it: and it is not the particular law of this Court only — it is so held in the Courts of common law. Mr. *Abbott*, in referring to cases on this point, says, “Salvors are entitled, by the common law of *England*, to retain the possession of the goods salved, until a proper compensation is made to them for their trouble.” This description of the nature of such rights will place the question in dispute in a proper light: it points to the great distinction of things in the *Roman* law, and in the laws of modern nations, between those that are properly articles of commerce, and those *extra commercium*, as many things are reputed to be, on account of their connection with the public service of the state. A lien or right of retaining could only be applicable to articles of commerce, as to which the remedy would be capable of being made available under any state of facts which might intervene to affect the property. How would this case stand with regard to any such test? Such a principle supposes the master of a ship in that character in which he is appointed to merchant vessels, namely, as having an almost absolute power over the vessel. He is authorized to enter into contracts of different kinds, for the preservation of the interests of commerce. He has the direction and management of the vessel, and the cargo also is entrusted to him. His powers are of an

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Abbott on Ship-  
ping, p. 322.

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an extraordinary nature, and have the effect of placing at his disposal property which does not actually belong to him. It is a power specially conferred upon him for the benefit of trade, and maintained by the principles of the laws of trade. Hence it arises, that he would, in cases of distress, be enabled to protect himself from the consequences of that distress, with reference to any demand of this sort, by hypothecating the vessel under the well known contract of bottomry.

Now in what way would the law of bottomry attach to cases of this description? Would any one say that this ship could be hypothecated? or if not, that it could be put into a state of *quasi* hypothecation by the compulsory process of the Court? Would it be reasonable to apply to ships of war a principle that implies the power of conversion, which cannot be exercised over them? It may be asked also, with reference to a similar distinction, whether suits for wages could be instituted in relation to persons on board such ships? This Court does not usually entertain suits of wages on foreign vessels; but such suits are not unknown to the Courts of common law, where suits have been instituted for the recovery of wages against the masters of foreign ships on behalf of persons who have become entitled to their discharge in the ports of this country. But would a suit of this sort be entertained against the commander of a ship of war of a foreign country? The master of a merchant vessel is liable to his crew for their wages under the mariner's contract, which is signed by him; but would the relation between the commander of this vessel  
and



and his officers and crew bear any affinity to such a case?

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The military marine of different countries is subject to different regulations. In all countries the relations between the commanders and seamen of ships of war are very distinct from those of persons composing the crews of merchant vessels; and it cannot be contended, I conceive, that any person on board this vessel could maintain a suit for wages here.

There is also another ground of illustration, which I will take the liberty of using. Supposing the vessel had come into a *British* port, and had there been made subject to the law of foreign attachment, as it is called, which gives a power to attach goods of individuals for debts contracted by them in those places — this would be a practice by no means unusual in some countries; but it is a privilege which, I believe, is here confined to the customs of *London, Bristol, and Exeter*. Is it likely that such a proceeding could be maintained against a vessel of this description?

The character of ships of war is so much matter of special consideration in treaties, that it is often a subject of stipulation that they shall not be admitted into foreign ports, except under particular restrictions. Thus they are always viewed in their military character, and are distinguished in a marked manner from vessels engaged in commerce.

If ships of war are not admitted, except under special consent and acquiescence, into foreign ports, how is it consistent with that principle that their continuance there shall not be left to the power and control of their commanders, but made

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compulsory upon them, as subject to arrest by civil process? In other instances also they are distinguished from merchant vessels, as not being subject to search and restraint by the officers of the customs. In the ports of *Holland* they are exempted from tonnage duties, and I am informed that they do not pay tonnage or light money on coming into the ports of this kingdom. These are instances in illustration of the peculiar character of ships of war. They will be found to afford a strong analogy in support of the principle for which we contend, drawn from distinctions which are actually recognized, or flow from principles which cannot be disputed; and I trust the Court will not think they are unnecessarily introduced on a question of this kind, which is not known to have been a subject of direct legal decision.

Ch. 3.

I will now put the case in another form, by claiming for ships of this description the same exemption from process or arrest which is allowed to foreign sovereigns, and the public functionaries of foreign governments. Foreign princes are held to come into the territory of another government under a sort of implied consent, which attributes to them an inviolability as to their persons, and exemptions from the ordinary process of the laws. *Bynckershoeck* discusses to this effect the condition of princes, in foreign countries, in a chapter of his treatise "*de foro legatorum*;" and the well known instance of ambassadors, and the reason for their exemption, is so universally recognized, that it is sufficient to advert to it in general terms. Their privilege is upheld in all countries,  
both

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both with regard to the civil and the criminal jurisdiction; and this exemption with regard to such persons, instead of being weakened, has become more firmly respected, in proportion as the intercourse of states has grown more frequent. A similar privilege appears to be due also to other collective bodies of persons exercising public functions in a foreign country; and here I advert to what would be the situation of a military force passing through a country by the consent or tacit acquiescence of the prince. An army so being there, must retain the rights and privileges which before belonged to it, so far as might be necessary for the maintenance of its character. In the case of our troops in *France*, there must have been such exemption in regard to the power of establishing regulations, and exercising the law military, which was administered, I presume, independent of the civil authorities or institutions of the country. Among the numbers who composed the *British* force in *France*, there must have been some to whom the compulsory proceedings of civil process might have been applicable; but yet I imagine that no instances of such arrests have occurred.

These are all instances of exceptions from the ordinary prosecution of civil demands recognized by the law of nations, not in favour of individuals, but in respect to the great object of that law, the mutual preservation of rights essential to the defence and independence of sovereign states; and a general argument arises from them, which is, we contend, applicable to this particular case, since all countries must attach equal importance to the uninterrupted performance of the services on which

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their ships of war *are* and *may* be employed ; and it will be impossible to justify any detention, in particular instances, that may not be extended to other cases even of most extreme exigency.

I now come to such authorities as can be collected in the nature of precedents of any kind, and especially of adjudged cases. I have looked anxiously for such cases, feeling the great importance of this question, but I have not been able to find more than two which have any immediate application to it. The effect of this observation, however, is rather favourable to us, since, if cases have not occurred to raise the question, the inference will be, that it is not necessary to interfere with the perfect security of ships of war to provide a remedy for occasions which are so rare ; or if services having been rendered, it has not been held competent to make them the subject of civil process, that would be a direct authority in our favour. And it will not be material whether this point has been so ruled by judicial authority, or by the authority of governments, where the constitution of the country permits that authority to be interposed, because this question depends on the principle which is proper to be applied under the law of nations, whether administered in one form or the other. The first case is to be found in

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*Bynckershoeck*, in the treatise before cited, in which he discusses the question, "*Principis bona in alterius imperio an per arrestum forum tribuant.*"

He there describes the case of three *Spanish* ships of war, which had been arrested for a debt of the King of *Spain* by civil process, similar to the proceedings by foreign attachment before adverted to.

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The result is, that with regard to the general question he does not find any distinction in the cases commonly arising between the goods of sovereigns and those of private individuals; but in the case of the *Spanish* ships of war, the authority of the government was interposed at the request of the *Spanish* ambassador, and the ships were released, with an intimation, that if the debt was not discharged, the creditors would be entitled to the protection of the government in the form of reprisals. This is an instance of the privilege being allowed; and though it was by the authority of the state, *that* will make no difference in the fitness of the general principle, and it is in that sense submitted as a precedent for the Court, which has the same duty imposed upon it of extracting from the laws of nations the principle that is fit to be applied to this case. I will observe also incidentally, that the same writer, although he admits the liability of things belonging to foreign sovereigns to process of attachment, could not but be sensible of the great inconvenience of that principle, for he says, "*cavendum autem est ne res ad injuriam vergat, nec quod inter privatos summum jus est ex iniquis forte pragmaticorum decretis id summam injuriam ad principes porrigamus.*"

And an exception is there discussed, which, as it relates to the transient connexion of the king with the foreign country, may also be deserving of some notice here: "*Aiunt illi vel rem minimam arresto detentam sufficere ad subjectionem fori. Largiamur inter privatos, sic enim obtinuit, sed an ita principis equus per alterius ditionem transiens*

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Bynkershoek  
Opuscula, c. 4.  
Vide Aitzema,  
l. 48. p. m.  
1033. 1027.

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“ *poterit includi ut causam præbeat foro, si me*  
“ *auctorem sequaris non poterit, nec quicquam*  
“ *magis erit contra præsumtam, si non testatam*  
“ *mentem gentium.*” The instance which he puts  
may seem fanciful or trifling, but it marks the  
exception which the writer thought proper to be  
made, on the ground of mere transiency, even  
where the property of a sovereign might, by the  
general law, be liable to arrest, and the Court  
cannot fail to observe how much more applicable  
such an exception is to the present case.

The other case to which I shall refer, is one  
which has occurred in *America*, to whose judicial  
proceedings the greatest respect is due, as they  
are founded on principles so congenial to our  
own. It was a case relative to a vessel called  
the *Exchange*, which had been originally an  
*American* merchant ship, and had gone to *France*  
at a time when all vessels were liable to molestation  
from the new and absurd laws which were pro-  
mulgated from time to time by *Buonaparte*. She  
became there a victim to one of those ordinances,  
and was seized and condemned, and purchased by  
the government and converted into a ship of war,  
and in that character had come into one of the  
ports of *America*.

The original owners interfered, as in an ordinary  
case of possession, stating the circumstances of the  
case, and praying that the ship might be restored  
to them, under the authority of the Court.

The account which is given of the transaction is  
very long, and, therefore, I will not read the  
whole.

Sir *Wm. Scott*. — Where do you find that case?

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*The King's Advocate.*—It is reported in an *American* review, which is a book of considerable character, and contains many public papers.

That report, which is to be found in the appendix of the third volume, describes the proceedings, in which the Attorney General intervened, at the direction of the government, claiming protection for the vessel, as a ship of war belonging to a state in amity; and the Judge, on full argument, dismissed the libel, and decided that an armed vessel of a foreign power in amity was not subject to the jurisdiction of the Courts of *America*, so far as regarded the property. From this decree an appeal was prosecuted, on which the former decision was reversed in an elaborate judgment; and that sentence was afterwards also reversed on further appeal. On the latter occasion, Mr. Justice *Marshall*, who presided, went over the several topics which had been discussed in the Courts below, and decided that the *Exchange* appeared, by the proceedings, to have come into port as a foreign ship of war belonging to a friendly power: that whatever had been her former description or ownership, she was evidently the property of that power, and in that condition she must be held to be exempt from the jurisdiction of the Courts in that country; whereupon he reversed the judgment of the intermediate Court, affirmed the first judgment, and pronounced for the release of the vessel.

The reasoning used by the learned Judge upon that occasion, is similar to that which I have endeavoured to express as my own view of this case, and is founded on the principle, that ships of

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The American  
Review of His-  
tory and Poli-  
tics, and General  
Repository of  
Literature and  
State Papers,  
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war must be understood to come into the ports of a foreign country by consent, which implies a tacit acknowledgment of the privileges necessary for the maintenance of their public character, and amongst others, that of freedom from arrest on civil process.

Upon the authority of these cases, as well as upon general principles, we submit that this vessel must be considered to have come into the ports of this country under the same implied consent and acknowledgment, and that she cannot be held liable to proceedings of this nature at the suit of these individuals. I wish it to be understood, however, in contending for this exemption, as not asserting any proposition that necessarily leads to a denial of justice on claims of this description. There are other modes of redress by application to the foreign power, or to his ambassador in this country; and there can be no reason to suppose that such applications would not be properly attended to. Individuals who render services of this nature may be supposed to engage in them with reference to the character of the vessel, and are no more entitled to detain a ship of this description by process of this Court, as the subject of a suit here, than they would be to the benefit of having salvage decreed to them, upon a vessel of war belonging to our own government, in which case the Court has declined to entertain suits of this description.

Comus, 1816.

I now come to the single remaining part of the case; namely, whether any thing appears in the facts alleged in the act, which should prevent the application of the principle for which we contend.

It



It appears that during the late wars there had been a great accumulation of spices belonging to the government of *Holland* in *Batavia*; and ships of war were employed to bring them home. A quantity of those spices, amounting to about seventy or eighty tons, was on board this ship. Such employment of ships of war is common in the practice of all countries, and in none more than our own; for we have employed ships of war in times both of war and peace to bring home jewels, specie, cochineal, timber, and other articles; and I presume no one would say that our ships of war would lose their military character by such employment.

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What, then, are the other matters adverted to in the act? It is alleged, "that she had a quantity of spices on board," to the amount above described, but this is so small, that in such a ship it might easily have been stowed away on any occasion necessary. It then states, "that she was short of the usual crew at the time; that she came in with 250 men and 24 guns, a number wholly inadequate to the management, and very far short of the usual complement of a 74 gun ship." As to her having 24 guns, that would not make her less a ship of war, with respect to her comparative force; and as to her force of men, how can this affect the general question? Because the character and employment of the vessel is not to be limited to the present moment. The whole argument supposes ulterior consequences. The effect of the exemption is to be found in the general duties and general services of the ship. Her general character rests upon a supposition,

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position, that whatever she might have on board, she was liable and capable at any moment to resume her military character. The number of men and guns that she had on board were greater than she would have required for mere commercial purposes. The lading was so small in bulk as not to interfere with her military character; and if it had been greater it would have been thrown overboard, rather than defeat any object for which it might become necessary for this vessel to act in her proper military character. It cannot be doubted, that the honour of the flag and the public service of the country were to be asserted in preference to all other considerations, and therefore I contend that there is nothing in this distinction which affects the general argument, and that the protest is well sustained.

*The Advocate of the Admiralty.* — I am on the same side in this case; but those topics which have been already pressed upon the Court have been so fully argued by his Majesty's Advocate, that it appears to me that I shall best discharge my duty to those who have entrusted their interest to my hands, by not endeavouring to repeat the same points, further than shall be absolutely necessary: I have, however, a few observations to offer. The case brought before the Court is one, in every respect, of great importance and delicacy — a very extraordinary case, and, with the exception of the two cases which have been mentioned by his Majesty's Advocate, and which bear some analogy to the present, is, as far as our researches have extended, new and unprecedented. It is the case of a ship of war, belonging to a foreign state, sailing under

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the flag of that state, and commanded by an officer bearing its commission. She met with damage at sea, and came into a port of this country, into *Plsmouth*, for repairs, and she has there been arrested by the ordinary civil process of this Court, in a case of asserted salvage. An appearance has been given, as the Court sees under protest, and, we trust, it will appear, from the reasons set forth in the act, together with such observations as we now submit to its attention, that this protest is well-founded, and that this suit ought not to be maintained, but should be dismissed. This case, as I have already stated, is, as far as we can learn, a new one; and one, therefore, in which we have not the advantage of referring to precedents and authorities in support of the arguments we offer to the consideration of the Court, but in which we must have recourse to general principles and general reasoning — the principles of the general maritime law and the law of nations, and the analogies arising out of them. These are principles upon which this Court is competent to proceed, and upon which I conceive it always does proceed where foreigners are concerned, and more especially where foreign states are concerned. A Court of Admiralty does not sit to adjudge the cases which come before it, merely by the municipal laws of the country where it sits, but looks to the general maritime law as usually exercised, and as it is generally resorted to by foreign states also, as the ground of its decisions. It is upon these principles, and analogies to be deduced from them, that we offer to the Court the observations which we make in this case.

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Now we submit, that there is a class of things which are not subject to the ordinary rules applying to property; which are not liable to the claims or demands of private persons; which are described by civilians, whose language and reasoning is frequently adopted by the writers on general law, as *extra commercium*, and *quorum non est commercium*, and in a general enumeration are denominated *sacra, religiosa, publica* — *publicis usibus destinata*. If a more specific enumeration be made, amongst these will be found the forum, the basilica, the walls, and bulwarks of a city. These are things which are allowed to be, and from their nature must be, exempt and free from all private rights and claims of individuals; inasmuch as if these claims were to be allowed against them, the arrest, the judicial possession, and judicial sale incident to such proceedings, would divert them from those public uses to which they are destined. We submit to the Court, that ships of war belonging to the state are included in this class of things, by their nature, and of necessity arising from their nature, and the circumstances relating to them; that such ships are by their nature exempt and free, and so by law must be held to be, from all private rights and claims. They are destined to the public use, not only for the convenience and advantage of the state, but for its defence and protection. The very security of the state depends upon their free use, for if they could be interrupted and detained from public service in various exigencies, the security of the state itself might be endangered. Therefore I contend, from the very nature of the thing, ships of war are totally exempt from

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from the rights and claims of individuals, because such rights or claims could not be exercised against them, without diverting or running the risk of diverting them from those uses to which they are destined—by which the very existence of the state itself might be put in jeopardy. But ships have a property which undoubtedly, and most manifestly and obviously, distinguishes them from the other things referred to, that is, that they are moveable, and therefore may be found, not only in the ports and harbours of their own country; but likewise in those of foreign states. And the same inconveniences to which I have adverted would arise, if such a vessel could be arrested and detained in a foreign port, as if it occurred in those of her own country. But I shall submit to the Court that, by following up the reasoning and principles of the same general law to which I have referred; it will appear that the same immunity will follow such ships wherever they go, and belong to them in foreign ports as well as in their own. Now all general rights and claims between sovereign and independent states are mutual and reciprocal. Whatever right or claim is demanded by one state against another, that state must equally concede in its turn to the other. If it were claimed, therefore, that a ship of war of a foreign state should be subject to interruption and arrest, and be liable to civil process, by reason of the claims of individuals upon it in the port of any other country in which she may happen to be found, it would be necessary for the government of that country to concede that its own ships in foreign ports would be liable to the same interruptions; from which  
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the inconveniences I have referred to would arise, and clearly to the amount which I have already stated. A ship might be stopped and detained when going to convoy the trade of her country, and protect it from capture ; when going to supply a distant colony, or defend it from attack, or even when returning to protect its own country from invasion. The immunity contended for is necessary, therefore, to secure the occupation of such ships in the uses to which they are destined for the public service of their country — its defence and protection ; and necessary, therefore, for the convenience and advantage, and even for the security of every state to which such vessels belong. And this being so, it must be presumed to exist by the general consent of them all. It is upon such general consent expressed in some cases, but in very many others implied only, as it has been submitted to the Court to be implied in this, that a great part of the law of nations depends. I say, therefore, that ships of this description, namely, ships of war belonging to the state, come within that class of things which are considered by civilians to be *extra commercium*, and exempt from all rights and claims of private persons. And I contend, that these are not only so in their own ports and harbours, but also in foreign ports. And that, for the reasons which I have endeavoured to submit to the Court, this is and must be considered to be a part of the law of nations, founded on the consent of all, presumed from its necessity, for their mutual and general advantage and security.

But there is another point of view in which it appears to me to be proper to contemplate this case.

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case. It is the interest and duty of every sovereign independent state to maintain unimpeached its honour and dignity ; and no attack upon these can be suffered with any due regard even to its safety. Now I submit, that to subject a vessel of this nature, destined for such purposes, employed in such service, and sailing under such a flag, the flag of an independent government—to arrest and interrupt her in her important occupations at the suit of individuals—that this is an indignity to the state to which she belongs. And, as I have already stated, all rights and claims between independent states being mutual and reciprocal, the ships of any country which imposes this indignity upon another would be liable in their turn to the same treatment ; and no just complaint could be made if it were applied. The injury and evil would be mutual and general ; and therefore I again contend, that, upon this consideration also, it appears to be, and must be considered as a part of the law of nations, that such vessel shall be exempt from all processes of this kind, inasmuch as all nations must be presumed to consent to that which is necessary for the due maintenance of the honour and dignity of all.

In the act of Court we have stated that the principle is always admitted between independent states for the protection and security of such ships. The reason and foundations of this principle I have endeavoured to state to the Court. In making this assertion, we certainly do not mean that a series of precedents can be laid before the Court, in which the immunity contended for

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for has been made and allowed; for, as I have before stated, after all the researches which we have been able to make, and no diligence that could be used with any hope of success has been omitted, it still appears to us to be a new case. But we depend strongly upon the absence of precedents on the other side, as establishing a negative of the exercise of any authority of this kind; and we submit to the Court that this is an argument of no small importance, combined with the reasons we have stated, and upon which we contend that the denial of that authority is to be held a part of the law of nations. We have stated the principles upon which exemption from it is claimed for ships of this description, proceeding, as we submit, upon sound reasoning, arising from the nature and circumstances of things; which reasoning forms, in various instances, the rules of the law of nations. And it must surely be of great weight, in addition to what we have so been enabled to state, that no case has been found in which the contrary position has been asserted and maintained. No case precisely the same as this has occurred, as far as we are aware, here or elsewhere; none bearing the most distant analogy to this case appears to have occurred in this Court. Two cases, in some degree analogous to the present, not cases of salvage, but cases in which private demands have been set up against public ships, have been found in the books referred to by his Majesty's Advocate. The one of these, mentioned by *Bynkershoeck*, is that of certain *Spanish* ships of war, which were arrested, at the suit of private creditors of the king of



of *Spain*, in the harbour of *Flushing*, but which, upon representations of the *Spanish* ambassador, were ordered to be given up.

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Sir *William Scott*. — Was the arrest taken off upon such representations being received?

*The Advocate of the Admiralty*. — The vessels were given up upon the representations of the *Spanish* ambassador. The course which had been adopted was desisted from upon those representations being made; but it was the duty of *Holland* to take care that its subjects should not be deprived of their rights; these she was bound to protect, and therefore she pursued another course, that of threatening reprisals.

Sir *William Scott*. — If there should be a failure of justice, only in that case.

*The Advocate of the Admiralty*. — Demanding justice for her subjects, with threats of reprisals in case of denial. The very able writer who has stated this case entered into some consideration of the point of the liability of the property of the sovereign of the foreign state which may be found within the limits of another territory: his reasoning seems to go in support of the liability of such property to just claims and demands; but I would wish to draw the attention of the Court to this circumstance, that he does not take into consideration the public uses and services of vessels of war belonging to the state to which I have particularly referred, and which I consider as raising a great distinction. It appears to me, that the reasoning which he applies to the general public property of governments, or of a sovereign, may be allowed to be good reasoning, and good law, without affecting the

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the case of such a ship, with respect to which these proceedings are now pending before the Court; and upon all the grounds which I have stated, I still contend that this, being a vessel destined for the service and protection of the state, comes under the general considerations which I have already submitted.

The other case which occurred in *America*, I think, likewise appears by analogy, but only by analogy, to apply to the present.

Sir *William Scott*. — A case of title.

*The Advocate of the Admiralty*. — It was an *American* vessel which sailed from *America* in the character of a merchantship. She returned thither in the character of a vessel of war belonging to *France* — she was arrested by her former owners. The first Court to which the case was carried dismissed the suit; by the second, it was entertained; and it appears to have been so entertained upon the reasoning which is used by *Bynkershoeck*, upon the liability of the property of sovereigns or kingdoms in foreign states. In the highest Court to which it was appealed, it was reviewed and considered upon some of the same grounds which I have been endeavouring to state to this Court as affecting this subject; and the result was, that the suit was dismissed, and the property was not held liable to the claims of those who had arrested it. So far, therefore, as precedents can be found, they support what I have submitted to the Court in favour of the exemption of vessels of this description from private claims.

It is not denied, or intended to be, nor can it reasonably be denied, that if service has been done, a remuneration is due for it. It would be contrary

trary to the common principles of justice to maintain the opposite proposition, and none such is attempted to be maintained. If a service has been done, a recompence ought to be paid for it. That we do not deny. All that we contend for is, that it has been sought in an improper mode, and by a proceeding which cannot properly be sustained. We have suggested that a representation of the alleged service might be made to the government to which the ship belongs ; and that if such were made, remuneration would, no doubt, be obtained. It is not to be presumed that a foreign state would not do justice, or that such a representation would be ineffectual. But if there were any backwardness shewn upon the part of that state, the parties —

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Sir *William Scott*. — It is not stated in the act of Court that any such application has been made to the representative of the states of *Holland* ; but I believe something of communication was stated by the learned counsel.

*Lushington*. — It was mentioned at the time the monition was moved for that a letter, dated 20th October 1819, was addressed to the Baron *Von Fagel*, in which he was informed of the salvage effected by the salvors upon the *Prins Frederik*, upon the 29th of *September* preceding, when, by their means, the ship and cargo were saved from total destruction, and brought into *Plymouth* ; and that instructions had been received to institute proceedings in this Court, for the purpose of obtaining compensation for their services.

*Jenner*. — No answer having been given to this letter, proceedings were immediately instituted in this Court.

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*Lushington.*—The action was entered on the twenty-first.

Sir *William Scott.*—Then this was not an application to the foreign power for any reward to be paid for these services, but an intimation only that it was meant to proceed.

*The Advocate of the Admiralty.*—I was submitting to the Court that here would have been no failure of justice. I do not mean to say, that if these services have been done reward is not due, and ought not to be paid, but that it has not been claimed in the proper manner. I have submitted to the Court that there was another way for the salvors to proceed, by application to the foreign government; and if there were any backwardness in that government in acceding to the demand, they would have a right to the support of their own government to enforce it as a measure of justice, which every government is bound to demand and secure for its subjects. I submit, therefore, to the Court, that there could be no failure of justice. It is not to be presumed that the foreign government would refuse to listen to a case of manifest justice; and if it did, no one can be heard to suggest that our own government would not support the application, or that such support could fail of its due effect.

We have submitted to the consideration of the Court in the act, the great inconveniences which would arise if it should be held that vessels of this description were subject to arrest in civil suits for private claims. If such a doctrine were to prevail anywhere, it must prevail everywhere, upon the grounds which I have already stated, that all the rights

rights of nations are general and reciprocal. Our own ships of war would be liable to the same process in foreign ports, and might be interrupted in the course of the most momentous public service, to the hazard or destruction of our best and dearest interests. The mere mention of these consequences shews the monstrous nature of the attempt which is made; and I feel confident a measure, leading to such results, can never be sustained as consonant to the principles of public law.

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It remains for me to say a few words respecting the circumstances on which it is contended that this vessel is not entitled to the character of a ship of war. It is said that she is not fully armed, and that she has a cargo on board. Ships of war, particularly our own, are frequently employed in carrying stores and provisions, bullion, and other articles of small bulk in proportion to their value, either the property of the state or of individuals; and no one has ever breathed a doubt, that their public character was affected by such employment. This is a vessel of 1,700 or 1,800 tons burthen. She had on board spices, the property of the state, which, according to the enumeration in the act of the opposite party, amount to about 80 or 90 tons; a small quantity in proportion to her bulk, and which might be stowed away if necessary for hostile purposes. She had not her full force of men or guns, but still was a vessel of considerable force. She was sailing in time of peace, when no opportunity was likely to occur demanding the exertion of her full original force, but when still the force which she had might be useful to protect her from insult, as it is known that cruizers under

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*South American* flags have been seen in south latitudes, which she had to pass in her course from the east to *Amsterdam*. I contend, therefore, that these circumstances do not affect her public character, and that, as she was sailing in the service of the state, under the flag and commission of the state, she was entitled to all the privileges of a public ship of war; and that as such a ship, on the grounds which we have submitted to the Court, she was entitled to exemption from this arrest.

*Jenner* for the salvors. — It is now my duty to trouble the Court with a few observations, on behalf of those who assert themselves to be salvors of this ship and cargo. I admit, with my learned friends, that this is a case of importance, and as they have treated it, it may also be one of some delicacy, but in my apprehension of no great difficulty. The principles upon which questions of salvage depend are not subject to the municipal regulations of the country in which the cases occur, but are of general application.

The argument which was urged by the Advocate of the Admiralty with so much ingenuity, that if a foreign ship is to be subjected to the process of this Court, the ships of this country may be also subject to a similar process in foreign Courts, is undoubtedly true, for there must be perfect reciprocity between independent nations. But neither equity nor reason seem to me to point out any distinction between the property of subjects of a foreign power and the public property of the foreign state. The same principle extends to all cases of salvage; and neither on principle nor authority can a subject of this country be deprived of

of his rights, because, in the prosecution of those rights, a ship, the public property of a foreign state, may be subjected to the process of this Court.

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It seems to be taken for granted, that public property is not, by reason of the nature of the thing, subject to the demands of private individuals, or to a judicial process; and cases have been adduced in support of this position, which, when examined, go to prove the direct contrary. And it is then said, that they must have been decided upon different grounds; and we are called upon to shew, that property of this description has been held liable to proceedings of this nature. Now I have always understood, that those who claim to be exempted from the general law must shew the ground upon which the exemption rests. If this is not or cannot be done, then the general principle must be applied. It will not, I apprehend, be sufficient to shew that, by some distant analogy to the *jus gentium*, there may be some slight pretension for this exemption; for it would be easy to shew that, by the *jus gentium*, those who have contributed by their exertions to the preservation of property have an immediate claim for compensation upon the property so saved, and have a right to seek for that compensation in the Courts of that country to which the property is brought. In the present instance, the Courts of this country are those in which the salvors have a right to look for their reward. As the established principle is, that they have a lien upon the thing saved, so they have a right to pursue that lien in whatever country the property may be situated.

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It is not denied that they have a right to some compensation, but it is said, that this is not the proper way of obtaining it; that the proceeding cannot be maintained; that an application of the nature suggested by my learned friends would be received with indulgence and liberality, as, indeed, all cases of salvage are entitled to be considered.

At this point of the argument the Court expressed a doubt whether the case was, in its circumstances, a salvage case, observing, that if the Court were to take the representation, as stated in the act, and also in the affidavit of the commander, to be true, and it was not contradicted, it amounted only to a very slight case, that of putting two men on board the ship as pilots, which might be expected as matter of courtesy, and did not seem sufficient to justify the raising a question as to the jurisdiction of the Court upon a very nice and delicate subject.

*Jenner* and *Lushington* replied, that they were not aware that any question as to the merits of the case was intended to be raised on the protest, which being to the jurisdiction of the Court, they had conceived it would not be proper to introduce into the act a detail of the services rendered, and had therefore struck out all such matter, which had been very fully set forth in the act as originally laid before them, supported by affidavits, and which constituted a case differing very essentially from that stated by Captain *Van Senden*, and one of very considerable merit on the part of the salvors; that supposing the representation of the facts in the protest to be merely introductory to the question of jurisdiction, they considered



considered it sufficient to deny the truth of such representation in general terms, without entering into particulars; that they were under great difficulties in what manner to proceed under the present intimation of this objection from the Court, and, after deliberation, suggested, that, as bail had been given under protest, it might still be proper that application should be made to the government of *Holland* for compensation, reserving the question of the jurisdiction of this Court, if it should be necessary to revert to it, without prejudice to the rights of either party.

The Court said, that it could have no objection to such an arrangement.

The *King's Advocate* and the *Advocate for the Admiralty* observed, that the question as to the rights and privileges of the foreign government was of more importance than any other consideration, otherwise, in acceding to such arrangement, it would be proper to advert to the great inconvenience which had been sustained by the arrest, and the loss of several thousand pounds occasioned by the detention. But as they were not desirous to insist unnecessarily on the judgment of the Court on the abstract question, they did not object to the mode proposed.

The case was accordingly directed to stand over, and a memorial on behalf of the salvors was presented to the ambassador of the *Netherlands*, who, after communicating with his own government, requested that the amount of the recompence due to them might be submitted to the award of Sir *William Scott*. In consequence of

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The PRINS  
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of this, the case was not again mentioned in Court.

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Nov. 17th,  
1830.

The following is a copy of the award made by Sir *William Scott*:—

I have considered the evidence respecting the *Dutch* line of battle ship belonging to his Majesty the King of the *Netherlands*, *armée en flûte*, and carrying a valuable cargo of spices, &c. from *Batavia* to the *Texel*, called the *Prins Frederik*, which was brought into *Mount's Bay* by the assistance of persons belonging to the *British* brig *Howe*, of the port of *Penzance*. These persons have since arrested this ship and cargo, by a warrant issued from the High Court of Admiralty, in a cause of salvage, on account of essential services rendered to them in a situation of imminent danger.

The whole of the evidence before me consists of affidavits made by the master, mate, and mariners of the brig *Howe* — of affidavits made by the captain, lieutenant, and four other officers of the *Prins Frederik* — of affidavits made by two officers of the *British* navy, who were witnesses to some parts of the transaction — and of an affidavit made by a person who describes himself as *French* Consular Agent and Vice Consul for *Oldenburgh* and *Mecklenburgh*. An affidavit is likewise exhibited, apparently signed by the *Dutch* Captain *Van Senden*, and produced as his, but on which appears, in an obliterated state, a part of the concluding paragraph, which expressed his belief, that, *but for*

*for the essential services rendered by these asserted salvors, his ship would have been foundered.* It has been communicated to me by the proctor for the *Prins Frederik*, that he declined to subscribe this averment, upon the ground that it was not founded in fact. But I confess it rather appears to me, that, after having stated, as he *has* done, the several particulars contained in the former parts of his affidavit, his scruples about the concluding part seem to be somewhat unreasonable and inconsistent; for no man, I think, can read the account which he himself gives of the state of the weather, of the ship, and of the whole crew, without arriving at the conclusion which he declines to express.

Upon the evidence contained in these affidavits, I have to observe, 1st, that the affidavits themselves are all made *in recenti facto*, when the knowledge of the facts, and the real sense of their extent and value, must be supposed to be most full and fresh; and, 2dly, that they are all produced on one side, that of the asserted salvors; no contradiction of any kind being adduced on the other, unless this affidavit of Mr. *Van Senden* can be so considered.

Upon the evidence, I do not think myself bound to observe more particularly, than by stating, that I think that essential service is therein shewn to have been rendered to this ship and cargo, and likewise to the numerous persons on board; both this valuable property, and the individuals who were in the care of it, having been preserved in a state of most critical danger. It appears to me, however, that there have been errors of conduct  
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Frederik*.

Nov. 17th,  
1820.

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on both sides, which have tended to reduce the value of this property, out of which the salvage is to arise.

I think that the first application for a recompense, in the nature of salvage, ought, in the case of a ship of war belonging to a foreign state, to have been made to the representative of that state resident in this country. In the present case no doubt can be entertained, that just attention would have been paid to the application, and due care taken, after proper information obtained, to have answered the claim in some form or other, as substantial justice might appear to require; for it is not reasonable to suppose, that private individuals in this country should go unrewarded, for services performed to the ships of foreign governments, when they would have been liberally rewarded for similar services performed for such ships belonging to their own. At the same time, the valuation of those services is proper to be obtained, at least in the first instance, from those governments themselves, and it is not till after their denial of justice, that recourse should be had elsewhere. Instead of this, the application is made direct to the captain of this ship, who treats it with undue disregard and defiance. I say *undue*, because at any rate some salvage was due, and if he personally was not liable, he ought at least to have informed them where the demand was to be made. On his refusal, a warrant of detainer is sued out of the Court of Admiralty, and this begets a delicate question of jurisdiction in international law, which the Court was disposed to treat with all necessary caution. The vessel is said to have been detained,  
under

under the authority of this warrant, for six months.

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Why she was not released upon bail, on an application to the Court, I know not; the Court would certainly have decreed it, if any such application had been made, *but without prejudice to the depending question of jurisdiction.* But the real state of the fact was, I presume, that the ship was in a totally disabled condition, and could not proceed upon her voyage without a total repair; and if so, it is by no means an exact representation of the case, that she was detained all that time by the mere authority of the warrant; and it is likewise an unfair charge that the wages and maintenance of the officers and crew, for the whole time, (amounting, as stated, to £5,400,) are placed to the account of that detainer, when the ship must otherwise have been detained by her own incapacity to proceed. I see no reason whatever, why much the larger proportion, both of officers and crew, might not have been shipped off to *Holland* whilst the vessel remained in that state of inability to proceed, however occasioned.

The value of the cargo, on its arrival in *England*, is stated to have been £27,750; but this is on a supposition that it had suffered a quarter's deterioration of its value by the distress which the vessel had encountered on her voyage. This, however, is merely conjectural; it may have been much more, and may have been much less.

It was an error on the part of the salvors not to have accepted bail in the value of £32,000. The Court, upon an application from the *Dutch* government, would certainly have decreed it, relying upon

**The Paton  
FARMER.**

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**Nov. 17th,  
1820.**

upon its good faith in that valuation; and the result of the appraisement has sufficiently shewn, that the interests of the salvors would have been more than sufficiently protected.

Upon consideration of the whole case, and of what has occurred in it, I adjudge the sum of £800 to be paid to these salvors, together with their expences.

## TARRAGONA.

**T**HE reduction of *Tarragona* by the combined operations of the land forces under the command of Lieutenant General Lord *William Bentinck*, and a part of the fleet under the command of Sir *Edward Pellew* (now Lord Viscount *Exmouth*), took place in the year 1813.

On the 7th of *June* 1820, a grant of £31,531 18s. was made to the land and sea forces, being the estimated value of the booty taken; and the commanders-in-chief, Lord *William Bentinck* and Lord *Exmouth*, were appointed trustees for the distribution.

The warrant, after reciting the capture of the booty and the application, on the part of the captors, for a grant of the estimated value thereof, and referring to the statute for regulating the payment of army prize money, &c., was in the following words:—“ We, taking the same into  
 “ our royal consideration, are graciously pleased  
 “ to give and grant, and do hereby give and grant,  
 “ to the said Lieutenant General Lord *William*  
 “ *Bentinck* and Admiral Lord Viscount *Exmouth*,  
 “ the said sum of £31,531 18s.; and that the said  
 “ sum be issued and paid, without any fee or other  
 “ deduction whatsoever, in trust for the benefit  
 “ of the said Lieutenant General Lord *William*  
 “ *Bentinck*, and the officers, non-commissioned  
 “ officers, and privates serving under his imme-  
 “ diate

*July* 12th, 1821.

When a grant of money in lieu of booty is made jointly to trustees for distribution amongst the naval and military forces employed in the capture, the trustees are bound to act conjointly, and if they delegate their trust to others, the persons deputed by them, though severally appointed, must likewise act conjointly. There ought always to be a joint and concurrent appointment and a joint and concurrent distribution.

54 G. 3. c. 86.

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“ diate command, and of Admiral Lord Viscount  
 “ *Exmouth*, and the officers, non-commissioned  
 “ officers, and seamen and mariners actually on  
 “ board of our before-mentioned ships employed  
 “ on that service, as booty and prize, or booty  
 “ money in the nature of prize money, under the  
 “ provisions of the said act passed in the fifty-  
 “ fourth year of the reign of our late royal father,  
 “ to be distributed under the provisions of the  
 “ said act of parliament, and agreeably to our pro-  
 “ clamation for the distribution of prize in force at  
 “ the time of the said expedition, and this our royal  
 “ grant, in manner and in the several proportions  
 “ following.” The proportions, in which distribution  
 was to be made to the several classes of the army  
 and navy, were here set forth, and the warrant then  
 went on as follows: “ And we are further pleased  
 “ to direct, that all such respective sums of money  
 “ shall be distributed as prize or booty money, or  
 “ money in the nature of prize money, according  
 “ to the provisions of the said act of parliament of  
 57, 90: 2. “ the fifty-fourth year of the reign of our late  
 “ royal father, and the several acts relating to the  
 “ distribution of prize money in our navy, and  
 “ our said proclamation, or this our grant, and  
 “ the rules and customs heretofore used and ob-  
 “ served in our army and navy respectively in  
 “ that behalf; and the agents entrusted with the  
 “ distribution thereof, by the said Lieutenant  
 “ General Lord *William Bentinck* and Admiral  
 “ Lord Viscount *Exmouth*, shall give all such  
 “ notices and make such notifications of such dis-  
 “ tribution as are required by the said act of par-  
 “ liament, and the several acts of parliament in  
 11 “ force



“ force relating to the distribution of prize money  
 “ in our navy, and our said proclamation, and pay  
 “ over all unclaimed shares to *Chelsea* and *Green-*  
 “ *wich* hospitals respectively, to be hereafter paid  
 “ to the persons entitled thereto, or remain for  
 “ the benefit of the said respective hospitals, ac-  
 “ cording to the provisions and regulations of the  
 “ said acts of parliament, and the several bills in  
 “ force relating to the distribution of prize money  
 “ in our navy: And we are further pleased gra-  
 “ ciously to order and direct, that in case any  
 “ doubt shall arise respecting the said distribution,  
 “ or in respect to any other matter or thing re-  
 “ lating thereto, the same shall be determined by  
 “ the said commanders of the said land and sea  
 “ forces, Lieutenant General Lord *William Ben-*  
 “ *tinck* and Admiral Lord Viscount *Exmouth*, or  
 “ by such person or persons to whom the said  
 “ commanders of the said land and sea forces  
 “ shall refer the same; and such determination  
 “ shall be final and conclusive upon all persons  
 “ concerned, and as to all matters and things  
 “ relating to the said distribution.”

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On the 28th of *September* 1819, whilst the grant  
 was in progress, and before it had received the  
 royal sign manual, Lord *William Bentinck* ex-  
 ecuted a power of attorney in favour of Lieutenant  
Colonel Kenah, authorizing him to receive the  
bounty money which might be granted to him and  
the forces which had been under his command,  
 and generally to act for him in every thing relating  
 thereto.

On the 4th of *November* 1820, Lord *Exmouth*  
 appointed *John Petty Muspratt*, and *Joseph Grimes*

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his secretary, to be his attorneys, jointly and severally to act for him in the premises, with full powers for that purpose.

The amount of the grant having been received, and the numbers entitled to share having been ascertained, preparations were making for the distribution, when a difference of opinion prevailed as to the rights of the agents. Lord *Exmouth* and his attorneys asserted that the distribution should be jointly made, and that the agency should be divided equally between the agents appointed by each of the trustees, so that Colonel *Kenah* should take a moiety, and Mr. *Muspratt* and Mr. *Grimes* the other moiety of the five per cent. commission on the sum to be distributed; whereas Lord *William Bentinck* and his attorney contended that Colonel *Kenah* should distribute to the land forces exclusively, and receive his commission on the proportion which he should so distribute.

~~After some discussion,~~ it was agreed on both sides to submit the decision upon the point to the Court of Admiralty.

An act on petition ~~was entered into,~~ and the warrant, and also the powers of attorney, exhibited.

On the part of Lord *Exmouth*, it was submitted, that his Lordship and Lord *William Bentinck* are constituted *joint trustees* for all and every the purposes directed in the warrant, and that the actual payment of the several shares to the one force or the other is a part of that joint trust, to be executed by themselves or their agents jointly for the whole conjunct force, and without distinction as to their respective services; and that Lieutenant Colonel *Kenah* is not entitled to have the shares belonging

belonging to the army, with the agency thereon, delivered to him separately, and in exclusion of the agents appointed by Lord *Exmouth*.

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On the part of Lord *William Bentinck* and his agent, it was submitted, that the separate distribution by Lord *Exmouth*'s agents of the share of the navy to the navy, and the separate distribution by Lord *William Bentinck*'s agent of the share of the army to the army, was consonant to law, custom, and equity, and in strict conformity to the tenor of the grant; that in all the captures by conjoint expeditions which have taken place during the last twenty-five years, it has been customary for distribution to be made separately by each separate agent to the naval and military forces entitled to share, with one exception only; that this practice is founded on equity and expedience, inasmuch as the agent for each description of force must necessarily be most competent to discharge the duties which relate to that force, and does actually discharge them; that on the occasion of the capture of *Genoa*, and the distribution afterwards made of the proceeds granted, the same course was pursued, the capture being made by the same naval and military forces, under the very same commanders. It was therefore submitted, that the proportion of the money due to the army ought to be paid over to the agent appointed for the army, and that he ought to make distribution of the same separately, and receive the agency thereon for his own use, agreeably to the provisions of the act of parliament, and conformably to the custom which had always prevailed on similar occasions, save and

54 G. 3.

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year 1813. A grant of the booty, or to speak more correctly, of a sum of money in lieu of the booty there taken, was made to Sir *Edward Pellew* (now Lord *Exmouth*), the commander of the naval forces employed in the capture, and to Lord *Wm. Bentinck*, who had the command of the land forces, in trust, to distribute it amongst the officers and men serving in the expedition. The grant is made to them jointly, and not severally. The law would, therefore, look to both of them for the due distribution of every part of the property so entrusted to them. If they had thought proper to have acted personally in the distribution of this sum of money, there can be no doubt that they must have acted conjointly, for there is no severance in the grant. Lord *Wm. Bentinck*, it is true, might, and probably would have paid more attention to the interests and concerns of the army, and Lord *Exmouth* to those of the navy; for it is natural that a greater part of the actual management should be in the hands of the persons respectively best acquainted with the different services; but still there must have been the concurrent attention of both of them running through the whole as a whole. It must, throughout, have been a joint transaction. It was not, however, to be expected, that these distinguished officers would act personally in the business of distribution, but that they would delegate their authority to others. Lord *Wm. Bentinck*, it seems, had given a general appointment to Colonel *Kenak*, as his agent, and, upon the issuing of this grant, Lord *Exmouth* gave a power of attorney to Mr. *Muspratt* and Mr. *Grimes*, constituting them his more immediate

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and special agents for the distribution of this property. There certainly was no joint appointment of agents by Lord *Wm. Bentinck* and Lord *Exmouth*, but the question is, whether the trust did not devolve jointly upon the agents, although severally appointed; and I am of opinion that it must be held to have so done. It was a conjoint trust according to the grant; and the persons deputed by the original grantees must take it precisely as their principals had done. If Lord *Wm. Bentinck* could not sever himself from Lord *Exmouth*, and Lord *Exmouth* could not sever himself from Lord *Wm. Bentinck*, neither could the agent of the one sever himself from the agent of the other. The principals could have no right to alter the nature of the trust confided to them by the crown, and if they delegate that trust to others, it must go to their substitutes precisely as it was lodged in themselves. That things should have taken the course they did, is natural enough. It was to be expected that Lord *Wm. Bentinck* would nominate a person connected and conversant with the affairs of the army, and that Lord *Exmouth* should select, as his agents, persons well acquainted with those of the navy. This is exactly what must have been supposed likely to occur. Strictly speaking, according to the grant and according to the act of parliament, the appointment of the agents should have been conjoint; and although this has not been literally complied with, I think it must be taken as if it were so. The appointments, though several, are, in reality, and for all practical purposes, to be deemed conjoint. It is said, that the practice has been otherwise; that it has been usual

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for the persons appointed by the commander of the land forces to act exclusively for the army, and the persons appointed by the commander of the naval forces for the navy, and it is not improbable that it may have been so ; but still I think the practice has not been in conformity to what the law requires. It is certainly more conducive to the security of all parties interested that there should be a joint responsibility, for a separation of responsibility must necessarily weaken the security of all. It is proper, also, that each of the grantees and their agents should know precisely what is claimed by the other branch of the service as well as by their own. I should not think of making any alteration in transactions that are long past and bygone, and settled to the satisfaction of the parties interested, but when I am called upon to consider the matter in a subsisting and unfinished transaction, I must say, that I think the practice, which is stated to have prevailed, has been erroneous. It seems to me that there ought always to be a joint and concurrent appointment, and a joint and concurrent distribution. Something of apparent hardship and injustice may possibly occur in this mode of settling the question. The army, in this particular instance, may have a superiority in numbers, and consequently a majority of interest ; but it must not be forgotten that this might have been just the other way. The navy may, in other cases, have the same or a still greater superiority in numbers, so that though there may be inequality in particular cases, yet there would be a general equality. Lord *Ellenborough*, many years ago, appears to have viewed the  
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the matter precisely in the same light, and to have expressed himself strongly to the same effect. Upon the whole, I am of opinion, that the appointment of Lord *Exmouth* and Lord *Wm. Bentinck* was a joint appointment; that if they had themselves acted under it they must have acted jointly; and that they can delegate their trust in no other way than as it was received by themselves.

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TARRAGONA.

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July 12th, 1821.

## BEE, WISHART.

Feb. 6th, 1822.

Pilots are not entitled to charge as *lay days* the day on which they enter and on which they leave a place of quarantine.

52 G. 3. c. 3.  
s. 42.

**T**HIS was a question of pilotage, between *Benjamin Port*, a cinque port pilot, and *John Wishart*, the master and sole owner of this vessel, depending upon the construction of the Pilotage Act, passed in the 52d year of his late Majesty.

*Port*, who was a regularly appointed cinque port pilot, boarded the vessel on the 4th of *December* off *Dover*, piloted her to the *Downs*, and afterwards to *Standgate Creek*, where she arrived about noon on the 6th of *December*, and remained under quarantine until ten o'clock in the morning of the 8th, during which time he remained on board, and then piloted her to *Gravesend*, where she arrived at ten A.M. of the 9th. The pilot claimed to be entitled to the sum of £2 2s. for boarding the ship off *Dover*, and piloting her to the *Downs*; to the sum of £9 9s. for piloting her from the *Downs* to *Standgate Creek*; to the sum of £1 4s. for remaining there with her three days under quarantine; and to the sum of £4 16s. 3d. for piloting her from *Standgate Creek* to *Gravesend*, — amounting altogether to the sum of £17 11s. 3d. The claim of the pilot was admitted by the owner, except as to the sum of £1 4s. for the time the ship was under quarantine, and a tender was made of £16 15s. 3d. as the amount due to the pilot, including 8s. for remaining under quarantine one day only. The question



question was, whether the days on which the vessel entered and left *Standgate Creek* were to be considered *lay days*, for which the pilot was entitled to charge.

The Bxx.  

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Feb. 6th, 1822.

Lord *Stowell*\* held that they were not so to be considered, and pronounced the tender of the owner to be sufficient.

*Note.* — The regulations of the Trinity House (confirmed by the Chief Justice of the King's Bench), for the payment of their pilots, are in conformity with the decision of Lord *Stowell* in this case.

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\* On the 14th of *July* 1821 Sir *William Scott* was created a Peer of the United Kingdom, by the title of Baron *Stowell* of *Stowell* in the county of *Gloucester*.

## BATAVIA, heretofore THE UNITY.

Feb. 15th,  
1822.

The owner of a British ship cannot, by the sale of his ship to a foreigner in a distant part of the world, divest the seaman of his wages earned under a contract entered into with himself in this country, and the Court of Admiralty will enforce the payment of wages so earned. A fortiori, if the transfer of the ship was merely colorable.

THIS was a suit brought by *Samuel Curtis*, for wages earned by him in the capacity of mate, on a voyage from this country to the *East Indies* and back. The ship, originally named "*The Unity*," was built at *Dundee*, in *Scotland*, and duly registered as the property of *Richard Thornton*, a *British* subject. She was dispatched, under the command of *James Turner* as master, with *Curtis* on board as mate, to *Batavia*, where she landed part of her cargo, — proceeded thence to *Singapore* and back to *Batavia*, where she delivered the rest of her cargo. Whilst lying at *Batavia*, *Robert Thornton*, who was a *British-born* subject, but had been for some time absent from *England*, caused the name and national character of the ship to be changed, directing the master to obliterate the name "*Unity*," which had been painted on her stern, and to call her the "*Batavia von Batavia*." *Richard Thornton* deposed, that this change of name and national character took place in consequence of a sale of the ship by him to *Robert Thornton*, who had settled at *Batavia*; but *Curtis* and others deposed that no such transfer took place; that the ship originally was and still remains the property of *Richard* and *Robert Thornton* and *Wm. Ogle West*, who were partners in a house of trade in *London*; and that the pretended transfer of the ship was, as admitted by *Robert Thornton* at the time, for the sole purpose

pose of evading the payment of the additional duties which would be charged upon her as an *English* ship in the ports and colonies of the *Netherlands*. The vessel was afterwards navigated under the *Netherlands East India* flag to *Antwerp*, where she delivered her cargo to *Wm. Ogle West*, to whom it was consigned, and then sailed in ballast for the port of *London*. At *Gravesend*, *Richard Thornton* came on board, in the absence of *Turner* the master, directed *Curtis* to act as master—to bring the ship on to *London*—and to report her at the custom-house as a *Batavian* ship, which he accordingly did, representing himself to be the master and a *Batavian* man.

An appearance was given under protest for *Robert Thornton*, the asserted owner of the ship.

*The Advocate of the Admiralty*, in support of the protest, argued, that the Court had no jurisdiction over this case, first, because the ship, against which the suit was promoted, was a foreign ship, sailing under foreign colors, and belonging to a subject of the king of the *Netherlands*, residing and carrying on business in a colony of that kingdom; and that the suit had been instituted without the consent of the ambassador or consul or other public officer of the King of the *Netherlands*. Secondly, because the party promoting the suit was not a *British* but a *Batavian* subject, and had so sworn himself to be when he reported the ship at the custom-house; and lastly, that he was not the mate, but the master of the vessel, and therefore incapable of suing for his wages in the Court of Admiralty.

*Lushington,*

The *BATAVIA*.

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Feb. 15th,  
1822.

**The BATAVIA.**

**Feb. 15th,  
1822.**

*Lushington*, for the party suing, admitted, that the Court generally declined to entertain suits for wages earned on board foreign ships, unless with the consent of the representative of the nation to which the vessel might belong; but he contended that this was to be deemed a *British* ship—that there had been no *bond fide* transfer—that she was still the property of the original *British* owners, who had disguised her solely for the purpose of avoiding the payment of duties, and of facilitating their commerce with the *Dutch* colonies—that *Robert Thornton* was a member of a house of trade carrying on business in *London*, and was still to be considered a *British* subject—that the party suing was a native of *England*, and had never been domiciled in any other country—that he had been hired, and had acted as mate during the whole voyage to the *East Indies* and back—and that the mere circumstance of his having assumed the character of master from *Gravesend* to *London* would not bar his right to sue in the Admiralty for his wages, at least until the time of his arrival at *Gravesend*.

#### JUDGMENT.

Lord *Stowell*.—If the fact were fully established that this vessel had been transferred to a foreign owner, I should still hold, under the circumstances of this case, that this Court has authority to take care of the claims of a *British* mariner. It can never be allowed that the owner shall, by selling his ship in a distant part of the world, divest the seaman of his wages earned under a contract entered into with himself in this country. I have  
not

not the slightest doubt as to the power of the Court to enforce such a contract upon the return of the vessel to this country, and therefore feel no hesitation in compelling the payment of the wages sued for. The Court might certainly feel some delicacy in interfering with foreign vessels, without the sanction of the representative of the country to which they belong, but I do not believe that there has been in this case any sale of this ship; I think it was a mere colorable transfer, with a view of avoiding the heavy duties at *Batavia*. I am clear, therefore, upon the point of jurisdiction on this part of the case; and as for the pretence that this man has lost his right of suing for his wages as mate on the voyage from this country to *Batavia* and back, because he acted in the capacity of master in conducting the vessel from *Gravesend* to *London*, that never can be held a valid objection. I shall overrule the protest, with costs.

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The *BATAVIA*.

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Feb. 15th,  
1822.

*Note.*— This case was no farther proceeded in, the wages being immediately paid.

## JULIANA, OGILVIE.

March 19th,  
1822.

In a divided voyage, in which cargoes are successively taken in and delivered at different ports, and freight thereby earned for the owners, the mariners are by the general law entitled to their wages up to the time of arrival at each port of delivery; and an attempt to extinguish their right, in case of the loss of the ship on the last part of such divided voyage, by inserting a covenant in the ship's articles that they shall not be entitled to any part of their wages unless the ship returns to the last port of discharge, will not be upheld by the Court of Admiralty.

**T**HIS was a suit instituted by *William Lattimore*, a seaman, against *George Horsley Palmer* and *Lestock Wilson*, the principal owners thereof, for the recovery of wages earned on board this ship.

A summary petition was given in and admitted on the part of *Lattimore*, in which it was pleaded, that in *August 1820* the *Juliana* was designed on a voyage from *Portsmouth* to *New South Wales*, thence to *Batavia*, thence to *Bengal*, and back to the port of *London*; that the master hired him as a seaman on board for the voyages, at the rate of £2 per month; and that on the 22d of *August* he went on board and entered into articles of agreement; that the ship took on board convicts for *New South Wales*, and arrived there on the 27th of *December* following, landed the convicts, and, having taken on board live stock and salt, in *January 1821* set sail for *Port Jackson*; arrived there at the latter end of the same month, delivered her cargo, and in the following month proceeded in ballast to *Batavia*, and there arrived in the month of *March*; that she then took a cargo of poultry for *Minto*, and copper, oil, and spices for *Bengal*; arrived and delivered the poultry at *Mintoe*, and proceeded to *Siccapore*, where she arrived on the 4th of *May* following, and having discharged the rest of her cargo, and taken in 300 tons of sugar for *England*, sailed on the

the 15th of *July*, and arrived in the *Downs* on the 19th of *December*; that the ship struck on the *Kentish Knock* on the 24th of *December*, and was wrecked, and all the crew, with the exception of *Lattimore* and another mariner, were lost; that *Lattimore* was picked up by a fishing boat on the 27th of *December*, and came to *London*; that he applied for his wages, but was refused payment. The petition then pleaded that *Lattimore* faithfully performed his duty as a seaman, and well deserved the wages schedulate; and it further pleaded, that during the voyages aforesaid, save the voyage from *Calcutta* to *London*, large freights were earned; and that on the last voyage a considerable part of the cargo was saved from the wreck; and that the freight earned upon what was so saved, was more than sufficient to pay the wages claimed.

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## Schedule referred to in the Petition.

<i>William Lattimore</i> , shipped on board the <i>Juliana</i> , 22d of <i>August</i> 1820, and arrived at <i>Deptford</i> 27th of <i>December</i> 1821, being sixteen months and five days, at the rate of £2 per month			
			32 6 8
By sundries received	-	-	7 0 0
			<hr/> 25 6 8 <hr/>

An allegation, responsive to the summary petition, was brought in on the part of the owners.

It pleaded, in the first article, that previous to the ship sailing from *London* in *August* 1820, articles, of the usual printed form, were prepared in duplicate, and filled up, whereby the officers and seamen engaged to proceed on a voyage from *London* to *Botany Bay*, the *East Indies*, and all  
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ports and places to the eastward of the *Cape of Good Hope*, to which she should be ordered by the owners or their agents, and from thence back to the port of *London*, under the conditions therein mentioned; that the articles of agreement were signed in duplicate; that one part of them was sent to the owners in *London*, and has since been brought into the registry of the Court, and that the other part was retained on board the ship, and was lost when she was wrecked on the *Kentish Knock*; that by these articles it was agreed, *that no officer or seaman should demand or be entitled to his wages, or any part thereof, until the arrival of the ship at the above mentioned port of discharge, and her cargo delivered*; and it further pleaded, *that by the above mentioned port of discharge was meant and intended the port of London, and that the ship was totally lost, together with her cargo, on her return to and before her arrival in London, and before any part of her cargo had been delivered.*

The second article recited the latter part of the summary petition, in which it was stated, “that when the ship was wrecked, a considerable part of the cargo was saved, and that the freight earned upon the part of the cargo so saved was more than sufficient to pay the wages claimed,” denied the truth of what was so stated, and alleged, that the whole cargo was lost, except sixteen boxes of oil and ginger, supposed to be a part of it, which, from the damaged state they were in, and the expences to which they were liable, were of little or no value; and if they had been delivered in *London*, the freight of them would not have amounted



amounted to more than about £13; and that no freight has been received or is due or recoverable for any part of the cargo.

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The admission of the first article of this allegation was opposed.

#### JUDGMENT.

Lord *Stowell*. — This is a suit commenced by a mariner for wages acquired in a very long voyage, the particulars of which are set forth in a summary petition. It is alleged that this seaman, *William Lattimore*, was hired in *August* 1820 to proceed, at wages therein specified, on board the *Juliana* from *Portsmouth*, designed on a voyage to *New South Wales, Batavia, Bengal*, and back to *London*. She accordingly sailed with a cargo of convicts to the river *Derwent* in *New South Wales*; arrived, and landed them there, took on board live stock and salt provisions, and sailed to *Port Jackson*, where she delivered that cargo; and then sailed to *Batavia*, where she took in a cargo of poultry, which she partly delivered at *Minto*, and then sailed to *Siccapore*, where she delivered the remainder, and took in sugar for *England* and various goods for *Calcutta*, at which place she discharged the latter goods, and took in other articles for *England*. In the month of *December* last she arrived in the *Downs*, where having struck on the *Kentish Knock*, she was wrecked, and every soul on board perished, except *Lattimore* and another, who were picked up by a fishing boat; and it is alleged that this seaman, during the whole of these voyages, did well and ably perform his duty. These circumstances are all of them honestly and fairly admitted by the owners; but it is pleaded in the first article of their

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allegation, that all the mariners, previously to their sailing from *England*, signed articles, whereby it was amongst other things stipulated, that no seaman belonging to the vessel should demand or be entitled to his wages, or any part thereof, until her return to *London*, and her return cargo delivered. It is admitted by the owners, in their answer to the summary petition, that they had received nearly three thousand pounds freight for the early parts of the voyage, and possibly more, as they had not yet received the whole of their accounts from their agents in *India*; whether they had assured their freight and received from the insurers, or not, does not appear.

This is then a divided voyage, in which cargoes successively taken in and delivered at different ports earned freight for the owners at each port of delivery by the known general law; and by the same general law, wages were earned by the mariners. I believe I might, for both purposes, without rashness, appeal to the writings of every accredited author on such subjects in every language of the maritime nations, and to every decision of their maritime courts. What the contract was between the owners of the ship and the freighters does not appear — no contract is exhibited, nor is it described; at what time the freight, which they admit to have been received, was paid, is not stated. At any rate it could therefore only have been suspended, not extinguished, as the wages of the seamen are contended to be, by the loss of the ship. It is less material to enquire into this point, because no agreement of the owners, however qualified, with the freighters, would bind the mariners to forego any benefit that belonged to them.

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them. If the owners have foregone any such benefit for themselves, they are undoubtedly wise enough in their generation to indemnify themselves by other terms of the contract—by enhancement of the freight—or by such other means as would restore the just equilibrium of interests under it. The common mariner is easy and careless, illiterate and unthinking; he has no such resources, in his own intelligence and experience in habits of business, as can enable him to take accurate measures of postponed payments, with proper estimates of profit and loss. I observe that many signers to these articles are marksmen; whether the present suitor could write or read does not appear; for the duplicate which he executed was lost with the vessel. The probability is, that if he reads at all, *non legit ut clericus*, he does not read with a clerk-like understanding of the import. Upon all principle, therefore, the agreements of the two contracting parties, so differently qualified, are not to be scanned by exactly the same measure.

Another more important distinction between owners and mariners is this, that whatever bargain the owners may make with the freighters, they can insure their freight against all misadventures—not so by the law of *France*, which prohibits the owners from insuring. By the law of *England* their insurance of the freight is as little affected by the total loss of the ship, as the insurance upon the ship herself. But the mariner is not permitted to insure his wages by the policy of our law, in order that he may be stimulated to all possible personal exertion for the preservation of the ship, on which alone all his own interests are made to

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depend. The result is, that the mariner embarks upon terms of great comparative disadvantage. The owner contracts with a certainty of receiving his freight at all hazards, if not from the hand of his freighter, from that of his insurer, and it is indifferent to him from which. If he does not insure, it is only because he thinks it more beneficial to himself to stand his own insurer. But the mariner goes to sea upon the single security of the freight. His labours and perils have nothing else to trust to. Freight is the mother, and the only mother of wages; if that goes, every thing goes. He has no stepfather, if I may so say, in the character of insurer, to supply the loss.

The freight being the only security of the mariner, the Courts have been justly anxious to uphold his lien upon it. Whenever freight is earned, his title to wages becomes vested, though the time of payment may, from causes of necessity or convenience, be postponed. Where a voyage is divided by various ports of delivery, a proportional claim attaches at each of such ports; and the Courts have upheld that title against all attempts to evade or invade it. The attempts have usually appeared in the form of renunciations of this right obtained from the mariners, without any consideration whatever advanced for this surrender. The first form in which it was attempted, was in taking from them simultaneous bonds to that effect, at the execution of the usual contract. And if the Courts had supported these collateral instruments, the effect might have been this, that seamen might contract for a voyage of circumnavigation round the globe, might deliver cargoes at ten different ports, at each of which

which freight was earned by their owner, and then if the ship had the misfortune of being lost in her return home, upon the *Goodwin Sands*, they were to be turned adrift, if they escaped, without a single penny to face the debts which the necessary subsistence of their families had incurred during their three years absence, on a service of fatigue and danger to themselves, though of great emolument to their owner. I shall state a few leading cases to shew, that all *British* courts have concurred in discountenancing that attempt; and I am the rather disposed to do so, from conceiving that great misapprehension has prevailed upon the subject of these cases.

The first case that occurred after this contrivance of bonds was resorted to, was that of *Buck and Rawlinson*, determined in the Court of Admiralty, afterwards in the Court of Chancery, and finally in the House of Lords, in 1704. The captain of an *East India* ship took bonds on an outward-bound voyage to the *East Indies* from the mariners, conditioned that they should not demand any wages until the ship's return to the port of *London*, under a penalty of £200. The ship was lost in the river *Hugley*, after delivering part of her outward cargo. On the captain's return to *England*, he was sued in the Admiralty Court by the seamen for wages on the outward voyage; his owners refused to defend him; he filed his bill in the Court of Chancery against them and against the seamen for wages, for an injunction to stop the then suits for reimbursement. The injunction was at first granted, but, on further consideration and advisement, was dissolved by Lord Chancellor

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1 Brown, P. C.  
102. 137.

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*Somers* ; his Lordship declaring that *he could not stop the seamen's proceeding for their wages* ; and that if they recovered their wages against him, he had his remedy against his owners. Now nothing can be more clear than that Lord *Somers* had complete power to do what he had already done, to grant an injunction if he thought fit. It could be from no defect of power that he dissolved it ; and if these suits had appeared frivolous and oppressive, tending merely to exhaust the seamen, and harass their employers, he must have continued it. The bonds must have been before him, because they constituted the best defence the captain could make ; and they did constitute his defence in the Court of Admiralty, in which the suit went on ; for, as the report says, *the captain made the best defence he could, and particularly insisted on the bonds which the seamen had executed, and which that Court declared to be unjust and void in law.* Here is a direct judgment of the Court of Admiralty, and a strong indirect judgment of that great master of equity, Lord *Somers*, upon the invalidity of these bonds. For I find great difficulty in supposing that that injunction would have been dissolved, if Lord *Somers* had entertained any doubt of their invalidity. He surely never would have retraced his own steps upon any other ground than an alteration of judgment upon that point, — particularly when the force of his expressions is considered, that *he could not stop the seamen from proceeding for their wages.* There were proceedings afterwards in the Court of Chancery between the captain and the *East India Company*, in which Lord Keeper *Wright* had dismissed the captain's

captain's bill for reimbursement of the wages he had been compelled to pay by sentence of the Court of Admiralty. The whole matter travelled up afterwards to the House of Peers, where the Lord Keeper's decrees upon that point were *reversed*, and his payments to the mariners so far affirmed. It is mentioned somewhere, that the Lords *disapproved* the sentence of the Admiralty. I can find no trace in any report of any such disapproval, but quite the contrary. On the effect of the judgment, the contrary is strongly implied, for it leaves the mariners in full possession of their sentences, referring the other parties to their remedy of appeal, if they chose to try it. If the House of Lords had disapproved, they would have taken the same course that they did with the Lord Keeper's decrees, which they disapproved, and signified their disapproval by *reversing*. It is a very strong proof that no expressions of disapprobation dropped from the noble and learned persons who usually influence the law judgments of that House, that there the proceedings stopped. There can be little doubt, that if such expressions of disapprobation had occurred, the *East India* Company, in the temper which they then manifested, would have resorted, in quick march, to the Court of Delegates, in confidence of such encouragement received. But I have examined the registers of that Court at and about that period, and I find that no such remedy was attempted. The sentence of the Court stands unrepealed; and I think I may safely add, that Mr. *Vernon* is correct in referring to this case in his *Edwards v. Child*, when he describes it as *a case affirmed by the*

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Abbot on Shipping, p. 448.

2 Vernon, 728.

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*the House of Lords upon appeal, though the East India Company had taken bonds from the seamen not to demand wages unless the ship returned to London. What are we to understand by this description? There were three points before the House of Lords, the two decrees of the Lord Keeper and the judgment of the Court of Admiralty. The two decrees were actually reversed. What could be affirmed, but the judgment of the Admiralty? The description, as given by that accurate reporter, can apply to nothing else.*

This decision of the Court of Admiralty is not solitary. It expresses the standing law of that Court upon this subject. It is described as such in all books. It is some confirmation of its being the law of that Court, that it is so likewise in the *Scotch* Courts which proceed upon equitable principle as it does, — their Court of Admiralty and Court of Session. In that learned work of Mr. Bell, lately most deservedly elected Professor of Law in *Edinburgh*, entitled “*Commentaries on the Law of Scotland*,” the case of *Morrison v. Hamilton* is cited, as establishing a contract so worded to be only a suspension of the demand, not a limitation of the right. Mr. Bell seems to think, that if the agreement was more clearly expressed, it would be held effectual in *Scotland*. The probability of such an expectation is not, I think, fortified by what immediately follows, that in the case of *Ross v. Glassford*, in which the party founded upon a custom in a particular port to make such agreements, the Court declared, *that if such a practice did exist, it was highly to be disapproved of, as fraught with inhumanity and destructive to trade,*

Bell on Law of  
Scotland, vol. i.  
p. 515.

*Ibid.*



*trade, and that it was high time it should be corrected.* If so, clearness of expression for such a purpose would not be likely to facilitate its reception.

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To what I have observed respecting the case of *Buck and Rawlinson*, I would only add, that my highly venerated friend, Lord Chief Justice *Abbot*, expresses, in an early and valuable publication, a most just disapprobation of the judgment of the Admiralty, *unless the bonds were deemed by the Court to have been obtained by fraud or oppression.* But the fact must be taken along with it—that the Admiralty did so deem them, and so pronounce them; for it pronounced them *unjust and void in law*, which is only saying the same thing in another form of words. No man willingly submits to injustice, knowing it to be such; and if he does submit to injustice, it is upon advantage taken of his ignorance or his weakness, or, in other words, by oppression or fraud.

*Abbot on Ship-  
ping, Part VI.  
chap. 2.*

I come now to our Courts of Common Law, and the rather, because I see it declared in some books that those Courts hold a different law upon this subject from the Court of Admiralty. I know not the authority on which that can be asserted. In the first place, the contrary must be presumptively, at least, the doctrine of the common law, for being notoriously the rule of the law-merchant, it must be taken, till the contrary is shewn, to be the rule of the common law, which adopts the law-merchant as its guide upon the subjects which it regulates. If a variation is alleged, it must be shewn to exist, and by what authority; all presumption is against it; it is the doctrine of the law of *England*, as it is of the maritime world generally, that the title to  
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wages accrues upon the receipt of freight, not by the special terms of the contract, but by the general policy of the law. Freight, wherever acquired, is the mother of wages, without a word said about such an agreement in the terms of the contract.

1 Lord Ray-  
mond, 639.  
See also 739.

2 Vernon, 727.

8 East, 299.

The great leading case in the common law is the case decided by that great master of *English* jurisprudence, Lord Chief Justice *Holt*. No doubt can be entertained of the reality of this case, or of its authority. It is the foundation of long proceedings in the Court of Chancery, reported by Mr. *Vernon*, (*Edwards and Child*). It is mainly relied on in the argument in *Dodd and Appleby*; and it is expressly recognized by Mr. Justice *Laurence*, in the after consideration of that case, *as most justly decided*. That case was this: The captain of the ship *Success* took bonds from the seamen, *when he hired them*, not to demand any wages till the return of the ship to the port of *London*, and not to demand any wages if the ship was lost before her return to it. The ship sailed to *Bengal* and delivered her cargo, and was taken by the *French* on her return voyage. The captain was sued by the mariners for the wages that became due at *Bengal*, and *although the bonds were given in evidence in an action tried before the Lord Chief Justice Holt, yet the mariners recovered their wages*. The bonds being given in evidence, it is clear, first, that there was no objection to their mere form and execution; secondly, that they must have been *considered* by the Judge, being noticed as the foundation of the defence. The result was the same as in the Admiralty,—that they were deemed intrinsically bad; intended to controul,

2 Vernon, 728.

controul, not the terms of the contract, but a great principle of the general law independent of those terms, and as such, not entitled to its protection. Here is this case, described by Mr. Justice *Laurence* as most correctly decided, and unopposed by any one succeeding case before *Appleby* and *Dodd*; for what preceding case to that case is there in which Lord Chief Justice *Holt's* holding is at all controverted? Succeeding and opposing cases, if any occurred, must have been recorded; if no such cases are shewn, it must be taken that the determinations which followed must have followed the same course, and that the law was so settled. It is a great confirmation of this, that these collateral bonds were universally given up as ineffectual, and that another contrivance was resorted to on which the parties now rely.

The case of *Edwards v. Child* was subsequently carried up into the Court of Chancery, by the captain proceeding against the *East India* Company for his own wages, and reimbursement of the wages he had paid the seamen, and the Lord Chancellor decreed both should be paid to him with interest and costs. So that here was a strong affirmance of the equity of Lord Chief Justice *Holt's* decision by this judgment of that Court. Mr. Justice *Laurence* observes, in his judgment in *Dodd* and *Appleby*, that the Court of Chancery might have considered that there was something unreasonable in the bargain. Nothing can be more just than that conjecture; for on what other ground could it have refused all effect to the bonds?

Upon a fair view of these authorities, I think myself

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8 East, 303.

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myself entitled to say, that, in the judgment of the Court of Admiralty, of the Courts of Common Law, of the Court of Chancery, and of the House of Lords, so far as they have been called to the consideration of the subject, the attempt to extinguish the right of the mariner by collateral bonds of renunciation had clearly failed. Another mode was to be resorted to,—that mode which the Courts of *Scotland* have reprobated, of inserting a covenant into the contract itself to the same effect as that which had failed in the form of a bond. And *this was intended*, is it said, *to meet the difficulty*. What difficulty? Difficulty there was none in the law, for the law was clear and settled;—difficulty there was none arising from any contrariety of judgments in the Courts, for their judgments were all in harmony. I know of no difficulty but the ordinary one of finding the money, when it became occasionally due under the ancient and confirmed expositions of the law. Those who advised, and those who adopted the contrivance, entertained doubtless the hope that all difficulties of this species would be removed by the simple transfer of the covenant from the bond into the contract. It seems to have had its fair share of temporary success; for my honoured friend, the learned Lord Chief Justice, mentions, in the excellent publication I have adverted to, that no seamen had then claimed in any Court against the covenant down to 1802. When the transfer had been made of this covenant from the bond to the contract does not distinctly appear; but it was not brought controversially to the notice of any Court till 1808, in the case of *Appleby and Dodd*,

*Dodd*, tried at *Guildhall* before Lord *Ellenborough*, in which the seaman was nonsuited upon his contract; and in the following term moved for a new trial. It was moved very particularly on the authority of Lord *Holt*'s decision in the case of bonds. The reporter says, that Lord *Ellenborough* had ruled *that the true construction of the articles founded on the policy of the act of 37 G. III. c. 73. excluded the plaintiff's title pro rata*. That act was a *West India* act, levelled against the frequency of desertion in a *West India* voyage, which the voyage in question was. In its preamble, and in its whole provisions, it is confined to the prevention of that mischief so prevalent in those voyages. In the after consideration of the case, Lord *Ellenborough* is reported to say, "that the reason of this stipulation was *no doubt* to oblige the mariners to return home with the ship, and not to desert her in the *West Indies*; yet the terms of it are general, and include the present case; and we cannot say, against the express contract of the parties, that the seamen shall recover their wages;" and he adverts further "to the anxious policy of the legislature to enforce the return home of seamen in their ships from the *West Indies*." I think it is clear from this, that his lordship calls in this particular act as supplemental and auxiliary to this construction, and that he makes the intent of this stipulation to be, *without doubt*, the enforcement of the policy of that *West India* act. But you cannot associate this policy with this *East India* voyage, which has nothing to do either with its preamble or its provisions against *West India* desertions, for which

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8 East, 300.

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which purpose alone, as his Lordship asserts, the parties inserted the stipulation, and which therefore, I presume, he would not be inclined so to construe and apply, where no such purpose was in contemplation. Far from me be the presumption of impugning a judgment proceeding from persons of such splendid talents and character; — I knew them too well and respected them too highly; — all I say is, that the judgment does not approach to the present case; it stands, if I may so say, at the distance of half the globe from it. The present question is, therefore, as far as I know, untouched; and this Court is called upon, for the first time, to sanction this covenant in the contract, where it has no peculiar policy to support it, but stands upon the sole ground of ousting the general law, to the disherison of the mariners of this country.

In considering that question, I am not, I think, to forget the high authorities under which it has been uniformly held, that such a covenant *dehors* the articles, but executed at the very same time, and for the very same purpose, and in the very same terms, and by the very same parties, was *unreasonable* and *unjust*, and to be frowned upon by the law. Does it become more reasonable and more just by being incorporated in the articles? — Is its moral quality at all altered and improved by this mere alteration of form? If vicious in its substance and grain, is it purified by inserting it in the articles? Is the *bond* the mother of all the mischief? How this might be considered in a court of common law, I cannot presume to predict. I know that that system, admirable in its construction, and still more in its actual administration,

administration, resting most properly on its ancient and approved technical rules, is, on that account, sometimes unable to reach the real justice of a case, which it therefore leaves to other jurisdictions to discover and apply. No small part of the Chancery jurisdiction is built upon this very foundation. That exercise of jurisdiction is not seldom so applied to maritime contracts. In the first case I lay my hand upon, *Edwards v. East India Company*, it is stated, "that though a charter-party is so penned that no freight can be recovered upon it at law, yet, if the ship owners have a just demand, equity will relieve them." A court of law works its way to short issues, and confines its views to them. A court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case. This Court certainly does not claim the character of a court of general equity; but it is bound, by its commission and constitution, to determine the cases submitted to its cognizance upon equitable principles, and according to the rules of natural justice. How far a Court of Law would limit its view of the question to the letter of the contract, and leave these improvident men to find their way in a Court of Equity out of a bargain which that Court has deemed unreasonable, when it appeared in another form substantially the same, I am not entitled to pronounce. There are those who perhaps might lament, if this humble class of suitors were compelled to a pilgrimage through a second Court. This Court is not

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2 Vernon, 210.

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disposed to impose that burthen upon them ; — it will, as far as it can, protect these illiterate and unexperienced persons against their own ignorance and imprudence. And I confess I feel disposed to do so more in the case of mere articles than in the case of articles and bonds ; because I think it much more probable that covenants bearing hard upon them should slip, unnoticed, into articles which they execute as mere formal instruments of course, than into bonds, which are instruments of rare occurrence to them, and by which their curiosity would naturally be excited and alarmed. I may add, that the terms in which the stipulation appears, might probably be understood by the mariners, as they are actually understood by the Courts of *Scotland*, to signify only a postponement of the payment, not a privation of the title which the law had guaranteed to them. The words are sufficiently satisfied by that interpretation ; and I infer, from the present proceeding, that the mariners so understood them, otherwise they might be charged with a want of that good faith, with which they have a right to be credited, if they were now resisting a claim which they fully understood and admitted at the date of the agreement.

I have been alarmed, in the argument, with the terrible consequences that are to ensue, if I should reject the allegation ; for that, in that case, it is said, the representatives of all the unfortunate persons who have perished would attempt, by the same remedy, to recover the expected fruits of the labours and perils of their departed relatives. That objection carries with it no terror to my mind.



mind. If they are entitled to the remedy, it is peculiarly fit in such a case as this that they should have it.

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It has likewise been urged, for the same purpose of alarm, that I should introduce a diversity of law upon the same subject. That suggestion assumes what I am not prepared to admit, that a court of law would give a sanction to this contrivance for eluding the law by the incorporation of the covenant in the articles. I am not to anticipate, from any thing that has yet happened, that this will take place; but if it did, no diversity is *introduced*; it is a diversity already *existing*; it is no more than that which ordinarily results from the different operation of the rules of law and the principles of equity.

It is an objection often justly made to arguments, that cases of great hardship and inconvenience are put to exemplify the evil consequences that may result from the doctrine which is opposed, if it should be established, that the cases are extreme and extravagant, — exist only in the regions of ingenious fiction, — and lie quite beyond the sphere of all moral probability. What is the actual existing case in the simplest form of fact? Here is a poor man compelled to sue as a pauper, not being able to find any body to stipulate for him in costs; a man in a station of life very humble, but most useful, and on that account highly to be protected and favoured by the maritime law of a great maritime country. He enters into the service of this ship in the port of *London*. She carries a most troublesome, a most disgusting,

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and a most dangerous cargo, a cargo of convicts to *New South Wales*, which she delivers at that end of the globe. These wages are earned by the general law, without regard to any special agreement. Here she takes in a new cargo, and earns more wages by the delivery at *Port Jackson*, where more freight is carried. She sails to *Batavia*, where a new cargo is taken in, which is delivered at *Minto* and *Serampore*, with new earnings of freight and wages. She takes in a new cargo, partly for *Calcutta*, and partly for *London*; delivers the goods at *Calcutta*, where the same benefit accrues to her owners and mariners; and takes in more goods for *London*, for which port she sails. She arrives, *infra quatuor maria*, in what the law calls the King of *England's* chambers, in the *Downs*; in the very fauces of the ultimate port, after a voyage of above sixteen months' continuance. There this ship is unfortunately wrecked, and every soul on board, captain, officers, and crew, (amounting I know not to how many, but I observe that forty names are subscribed to the one contract that remains,) all perish, save these two men, who only are left alive to tell the story. He applies for his wages, states his services of labour and danger, which are not denied; but he is met by a covenant, that he shall not be entitled to any thing unless the ship is actually returned to *London*. I mean no reflection whatever on the gentlemen who avail themselves of the objection. They have a right to demand the judgment of the Court upon their covenant for their own interests in this case, and those general interests of other

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persons occupied in other cases of the like kind. I must particularly speak with marked approbation of their personal conduct towards this man in his calamitous condition. He was naked, and they clothed him; hungry, and they gave him food; sick, and they administered carefully to his recovery. On regaining his health he, not unjustly, requires his wages. But the result is, *perierunt tempora longi servitii!* for himself and his disappointed family, (if he has one,) and he is compelled to come to this Court as a pauper for his pittance, having nothing to shew but his services and his misfortunes, not much sweetened by the consolation of being informed that it is all his own doing, and that he has thought fit to bring it upon himself by his own indiscretion in signing such a contract.

I shall say no more than that this is the first Court to which this covenant has been directly presented, in a manner naked of any particular act of parliament or of any peculiar circumstance that should give a special influence and colour to the judgment upon the general question of its validity. The facts of the case are such as cannot recommend it, I think, to any Court upon any discussion. But at any rate, I will not be the first Judge on record who shall give it a sanction. I therefore reject this article of the allegation, and shall of course proceed upon the summary petition, and if it be duly supported by proof, shall feel myself bound by law, authority, and justice to pronounce for the wages on the outward voyages.

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*Note.*—The second article, which was merely contradictory to a part of the seaman's summary petition, alleging that enough of the cargo was saved to answer the wages, was admitted without opposition.

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# APPENDIX.

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## APPENDIX (A.)

**EXTRACT** from the definitive treaty of peace  
between Great Britain and France ; signed at  
Paris the 30th of May 1814.

### *Additional Article.*

1st.—His Most Christian Majesty, concurring without reserve in the sentiments of His Britannic Majesty, with respect to a description of traffic repugnant to the principles of natural justice and of the enlightened age in which we live, engages to unite all His efforts to those of His Britannic Majesty, at the approaching Congress, to induce all the powers of Christendom to decree the abolition of the Slave Trade, so that the said trade shall cease universally, as it shall cease definitively, under any circumstances on the part of the French Government, in the course of five years ; and that during the said period no slave merchant shall import or sell slaves, except in the colonies of the State of which he is a subject.

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## APPENDIX (B.)

**Extract** of a letter from Lord Castlereagh to the  
Duke of Wellington ; dated Foreign Office, August  
6th, 1814.

A second regulation, highly important to prevail on France to accede to, is, a reciprocal permission to our respective cruizers, within certain latitudes, to visit the merchant ships of the other power, and, if found with Slaves on board, in contravention of the law of their particular State, to carry or send them in for adjudication. To soften the exercise of this power, perhaps it might be expedient to require the sentence of condemnation to be passed in the Courts of Admiralty of the country to which the ship detained belongs ; the proceeds, if condemned, being divided between the captors and the State. Some power of this nature, within the tract of the Slave Trade, is of the first importance.

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## APPENDIX (C.)

**Extract of a Letter from the Duke of Wellington to the Prince of Benevento ; dated Paris, August 26th 1814.**

IT would be desirable, secondly, that the ships of war of both nations should, within the northern tropic, and as far to the westward as longitude twenty-five from Greenwich, have the permission to visit the merchant ships of both, and to carry or send in for adjudication those found with slaves on board, in contravention of the law of the State to which they should belong. It would be expedient to arrange that the adjudication should take place in the Courts of the admiralty of the country to which they belong, and that the proceeds, if the vessel should be condemned, should be divided between the Captors and the State.

## APPENDIX (D.)

**Extract of a Letter from the Duke of Wellington to Lord Castlereagh ; dated Paris, November 5th 1814.**

My Lord,

HAVING had an opportunity of talking with the Minister of Marine last night, regarding the measures to be adopted to carry into execution the King's orders for preventing the Slave Trade on the north-west coast of Africa, I discovered that that proposed in my note of the 26th of August, addressed to the Prince of Benevento, viz. *The reciprocal search by ships of war of both nations, of vessels trading on the coasts, was so disagreeable to the Government, and I had seen in different publications that it was likely to be so much so to the nation, that there was no chance in succeeding in getting it adopted,* and therefore I prepared the memorandum, of which I enclose the copy, to be submitted to the Minister, at a meeting which I was to have with him this day.

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### APPENDIX (E.)

Extract from the Protocol of the second special  
Conference relative to the Abolition of the Slave  
Trade, Vienna, January 28th, 1815.

Lord Castlereagh ayant dit dans le cours de ces explications que l'abolition de la Traité sur toutes les côtes au Nord de l'Equateur, étoit surtout désirable, comme fournissant les moyens les plus simples et les plus sûrs pour mettre un terme à tout trafic illegal et fraudulent, et pour exercer la Police contre les Batimens qui se preteroient à un pareil trafic, M. le Prince Talleyrand a prié Lord Castlereagh de déterminer le sens de cette dernière expression. Lord Castlereagh a répondu qu'il entendoit par cette Police celle que tout Gouvernement exerçoit en vertu de sa propre Souveraineté, ou de ses Traités particuliers avec d'autres Puissances.

M. le Prince Talleyrand, et M. le Comte Palmella ont dit, *qu'ils n'admettoient en-fait de police maritime que celle que chaque Puissance exerce sur ces propres Batimens.*

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### APPENDIX (F.)

#### *Declaration.*

Vienna, Feb. 8th, 1815.

The Plenipotentiaries of the Powers who signed the Treaty of Paris, the 30th May 1814, assembled in Congress :

HAVING taken into consideration, that the traffic known under the name of the *African Slave Trade* has been regarded, by just and enlightened men of all ages, *as repugnant to the principles of humanity, and of universal morality* ; that the particular circumstances to which this traffic owes its origin, and the difficulty of abruptly interrupting its progress, have to a certain degree lessened the odium of continuing it ; but that at last the public voice in all civilized countries has demanded that it should be suppressed as soon as possible ; that since the character and the details of this traffic have been better known, and the evils of every sort which accompanied it completely unveiled, several European Governments have resolved to suppress it, and that successively all powers possessing colonies in different parts of the world have acknowledged, either by legislative acts, or by treaties, and other formal engagements, the obligation and neces-

sity of abolishing it; that by a separate article of the last treaty of Paris, Great Britain and France engaged to unite their efforts at the Congress at Vienna to engage all the Powers in Christendom to pronounce the universal and definitive abolition of the Slave Trade; that the Plenipotentiaries assembled at this Congress cannot better honour their mission, fulfil their duty, and manifest the principles which guide their august Sovereigns, than by labouring to realize this engagement, and by proclaiming in the name of their Sovereigns the desire to put an end to a scourge which has so long desolated Africa, degraded Europe, and afflicted humanity:—

The said Plenipotentiaries have agreed to open their deliberations as to the means of accomplishing so salutary an object, by a solemn declaration of the principles which have guided them in this work.

Fully authorized to such an act by the unanimous adherence of their respective Courts to the principle announced in the said separate article of the Treaty of Paris, they in consequence declare in the face of Europe, that, looking upon the universal abolition of the Slave Trade as a measure particularly worthy of their attention, conformable to the spirit of the age, and to the generous principles of their august Sovereigns, they are animated with a sincere desire to concur, by every means in their power, in the most prompt and effectual execution of this measure, and to act in the employment of those means with all the zeal and all the perseverance which so great and good a cause merits.

Too well informed of the sentiments of their Sovereigns not to foresee that however honourable may be their object, they would not pursue it without a just regard to the interests, the habits, and even the prejudices of their subjects; the said Plenipotentiaries at the same time acknowledge, that the general declaration should not prejudice the period which each particular power should look upon as the most expedient for the definitive abolition of the traffic in Slaves. Consequently the determination of the period when this traffic ought universally to cease, will be an object of negotiation between the different Powers; it being however well understood that no means proper to ensure and accelerate its progress should be neglected—and that the reciprocal engagements contracted by the present declaration between the Sovereigns who have taken part in it, should not be considered as fulfilled until the moment when complete success shall have crowned their united efforts.



## APPENDIX (S)

By his Excellency Charles M'Carthy, Governor of the  
Colony of Sierra Leone and its Dependencies.

To Mr. Robert Hagan, Commander of His Majesty's Colonial  
Schooner, Queen Charlotte.

BY virtue of the power and authority vested in us by an act passed in the fifty-first year of the reign of His present Majesty, intituled *An Act for the Abolition of the Slave Trade*, I do hereby depute and authorize you *to seize and prosecute* all ships and vessels, Slaves or Natives of Africa, carried, conveyed, or dealt with as Slaves; and all Goods and Effects whatsoever that shall or may become forfeited for any offence committed against the said act, or any other act of parliament passed for the abolition of the Slave Trade, and which shall be found upon or near to the coast of Africa, or in any ports, havens, or rivers thereof, or within the limits of any of the colonies, settlements, forts, or factories thereof.

Given under my hand and seal, at Sierra Leone, this  
28th Day of January 1816.

(Signed)

CHA' M'CARTHY.

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